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CALIFORNIA LIFER NEWSLETTER™

State and Federal Court Cases
by John E. Dannenberg

Editor's Note:
The commentary and opinion noted in these decisions is not legal advice.

NOTICE OF APPEAL FILED IN *GILMAN V. BROWN*

Gilman v. Brown

USDC (N.D. Cal.) Case No. 05-00830-LKK-CKD
[*Ninth Circuit Court of Appeal Case No.* 14-15613]
March 27, 2014

Both the Board of Parole Hearings and the Governor filed a joint notice of appeal to the Ninth Circuit, which both challenged and effectively stayed the district court's ruling below that had found both Marsy's Law and the Governor's parole review power to be *ex post facto* laws, when applied to lifers whose commitment offenses predated the enactment of those laws.

> Please take notice that all Defendants in this action appeal to the United States Court of Appeals for the Ninth Circuit from the order and final judgment entered in this case on February 28, 2014. This notice includes not only the February 28, 2014 order and judgment but also all interlocutory rulings that gave rise to the order and judgment.

The Ninth Circuit Court of Appeal opened up case No. 14-15613, and on 4-9-14 announced procedural schedules extending through September, 2014.

> Setting cross-appeal briefing schedule as follows: Mediation Questionnaire due on 04/16/2014. First cross appeal brief due 07/07/2014 for Noreen Blonien, Board of Parole Hearings, Edmund G. Brown Jr., J. Davis, L. Dininni, Susan Fisher, M. Hochino, Dennis Kenneally, Jones Moore, M. Perez and Booker Welch. Second brief on cross appeal due 08/07/2014 for Richard M. Gilman. Third brief on cross appeal due 09/08/2014 for Noreen Blonien, Board of Parole Hearings, Edmund G. Brown Jr., J. Davis, L. Dininni, Susan Fisher, M. Hochino, Dennis Kenneally, Jones Moore, M. Perez and Booker Welch. Optional cross appeal Reply brief is due for Richard M. Gilman within 14 days of service of Third brief on cross appeal.

Just prior to the filing of the Notice of Appeal, which divested the District Court of jurisdiction, the District Court issued an order rejecting a lifer's pro se attempt to gain the court's action against that lifer's earlier Governor reversal. The court declined to file such an individual action, because all lifers are members of the *Gilman* class, and are represented by counsel. It's order clearly stated that any such papers received from a pro se lifer shall be returned by the Clerk, unfiled. CLN readers please take note.

> A document, entitled "Motion for Judgment and Order Enforcing 'Class Member' Ivan von Staich's September 14, 2011 Parole Grant, Rescinded by the Governor Edmund Brown on February 10,

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COURT CASES (in order)
Reviewed in this Issue:

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2012; Memorandum of Points and Authorities; F.R.Civ.P., Rule 71 in Support Thereof," was recently filed in this case, purportedly by a "Plaintiff Class Member In Pro Se." See ECF No. 537. Considerations of case management and judicial economy preclude further filing of such documents in this action.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that the Clerk of the Court shall STRIKE ECF No. 537, and shall not file in this action any further documents submitted by an inmate proceeding pro se. All documents bearing the above-captioned case name and/or number which are submitted to the Clerk of the Court by an inmate proceeding pro se shall be returned to the inmate with a copy of this order.

IT IS SO ORDERED.
DATED: March 25, 2014

For those who missed the stunning ruling of the district court below (now effectively stayed by the appeal), here is the order of that court.

Plaintiffs' surviving requests are for (a) a declaration that defendants have denied plaintiffs' rights under the Ex Post Facto Clause of the U.S. Constitution, and (b) injunctive relief.

The court accordingly DECLARES that Proposition 9, as implemented by the Board, violates the ex post facto rights of the class members.

The court further DECLARES that Proposition 89, as implemented by the governors of California, violates the ex post facto rights of the class members.

The court orders injunctive relief as follows:

1. Going forward, the Board shall apply Cal. Penal Code § 3041.5, as it existed prior to Proposition 9, to all class members. That is, all class members are entitled to a parole hearing annually, unless the Board finds, under former Section 3041.5(b) that a longer deferral period is warranted.

2. The Governor of California shall refrain from imposing longer sentences on class members than are called for by application of the same factors the Board is required to consider, as provided for by Proposition 89. This order is stayed for 31 days, and goes into effect immediately thereafter, unless a timely appeal is filed.

IT IS SO ORDERED.
DATED: February 27, 2014.

***

FIRST DISTRICT COURT OF APPEAL ORDERS NEW PAROLE HEARING FOR ROY BUTLER

In re Roy Butler

___Cal.App.4th ___; CA 1(2);
Case No. A137273
March 5, 2014

In re Butler began as one case and morphed in two. The one case (A139411) dealt with the purely legal question of fixing terms at one's initial parole hearing, per PC § 3041(a). That case, as reported earlier in CLN, was settled out of court, with the Board agreeing to promulgate a procedure wherein it would fix terms for each lifer at either his initial hearing, or his next subsequent hearing. The Board is in fact implementing this procedure, but it is a pyrrhic victory: the fixing of

PUBLISHER'S NOTE

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California Lifer Newsletter (CLN) is a collection of informational and opinion articles on issues of interest and use to California inmates serving indeterminate prison terms (lifers) and their families.

CLN is published by Life Support Alliance Education Fund (LSAEF), a non-profit, tax-exempt organization located in Sacramento, California. We are not attorneys and nothing in CLN is offered as or should be construed as legal advice.

All articles in CLN are the opinion of the staff, based on the most accurate, credible information available, corroborated by our own research and information supplied by our readers and associates. CLN and LSAEF are non-political but not non-partisan. Our interest and commitment is the plight of lifers and our mission is to assist them in their fight for release through fair parole hearings and to improve their conditions of commitment.

We welcome questions, comments and other correspondence to the address below, but cannot guarantee an immediate or in-depth response, due to quantity of correspondence. For subscription rates and information, please see forms elsewhere in this issue.

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a term has no bearing on a determination of suitability, vel non.

The second case (A137273) dealt with the question of whether the Board's denial of parole to Butler comported with due process of law. In this most recent decision, ordered published, the Court found that there was not some evidence of Butler's insufficient insight, and that the questions regarding his parole plans did not, by themselves, appear to suffice to support a denial of parole. Accordingly, the Court of Appeal remanded the matter to the Board to hold a new hearing in accordance with due process wherein they would consider the findings of the Court, as well as Butler's record before them, to redetermine his suitability for parole.

> The Board's decision to deny Butler parole does not meet a number of essential due process requirements. Its first reason for denial, that Butler lacked sufficient insight into the murder, is not supported by any evidence. Butler has expressed responsibility and ample remorse for, and an understanding of why, he participated in, the murder.
> The Board's decision, therefore, should be allowed to stand only if it is clear the Board would have denied Butler parole based on the only other stated reason for the denial, Butler's insufficient parole plans. It is not clear that it would and, for this reason, we must grant the petition, vacate the decision, and remand for further proceedings.

The Court summarized the current state of the law regarding parole decisions.

> " '[California Code of] Regulations, [title 15,] section 2402 contains numerous factors regarding both an inmate's unsuitability . . . and suitability . . . for parole that the Board must consider and rely on to assess whether the inmate poses "an unreasonable risk of danger to society if released from prison." ([Cal. Code] Regs., [tit. 15,] § 2402, subds. (a), (c), (d).) These "matrix of factors . . . contemplates that even those who committed aggravated murder may be paroled after serving a sufficiently long term if the Board determines that evidence of post-conviction rehabilitation indicates they no longer pose a threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1211.)
>
> " 'We review the Board's decision under a "highly deferential 'some evidence' standard." (*Shaputis II, supra*, 53 Cal.4th. at p. 221.) . . . The Shaputis II opinion states that the Board's decision "is upheld unless it is arbitrary or procedurally flawed." ([*Ibid*].) It does not specifically define what is meant by "procedurally flawed." Elsewhere, however, it states that "[u]nder the 'some evidence' standard of review, the parole authority's interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors." (Id. at p. 212.) . . .
>
> " 'More specifically, although " 'the precise manner in which the specified factors relevant to parole suitability are considered and balanced' " lies with the Board (*Shaputis II, supra*, 53 Cal.4th at p. 210, quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 677), its decision " 'must reflect an individualized consideration of the specified criteria. . . .' " (*Lawrence, supra*, 44 Cal.4th at p. 1232, quoting *Rosenkrantz,* at p. 677, italics added). . . . "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the *significant circumstance is how those factors interrelate* to support a conclusion of current dangerousness to the public." (*Lawrence*, at p. 1212, italics added.) The Board "must determine whether a particular fact is probative of the central issue of current dangerousness when considered in light of the *full* record." (*Prather, supra*, 50 Cal.4th at p. 255, italics added.)
>
> " ' " 'As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision.' " (*Shaputis II*, supra, 53 Cal.4th at p. 210, quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 677.) We are to ensure that the Board's "analysis of the public safety risk entailed in a grant of parole is based on a modicum of evidence, not mere guesswork." (*Shaputis II*, at p. 219.) We review not only the evidence specified by the Board, but the entire record to determine whether this modicum of evidence exists, . . . and look for "a rational nexus between the evidence and the ultimate determination of current dangerousness." (*Shaputis II*, at p. 221.) We do not reweigh the evidence. (*Ibid.*)' " (*Morganti, supra*, 204 Cal.App.4th at pp. 915-917, fns. omitted.)

Reviewing the positive psych evals, the Board first determined that denial for purported "lack of insight" was not supported in the record. That left the Court with the legal question of what to do if there was another reason cited by the Board (here, inadequate parole plans) for denial. In other words, if one of two reasons fell flat on review, should the Court order that the remaining reason was insufficient on its face, and therefore could not support a denial of parole? Or should the Court note that the

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Board should rehear the case, in accordance with due process, evaluating the remaining record as a whole to determine if it supported a finding of unsuitability.

The Court opted for a rehearing. It followed precedent in so deciding.

> The California Supreme Court has indicated that courts "may uphold the parole authority's decision, despite a flaw in its findings, *if the authority has made clear* it would have reached the same decision even absent the error." (*Dannenberg, supra,* 34 Cal.4th at p. 1100, italics added.) Consistent with this approach, several appellate courts have determined that, when one of the reasons for parole denial was not supported by some evidence and they could not determine what parole decisions would have otherwise been made, they had no choice but to grant the petitions before them and remand for further proceedings. The reasoning of these opinions includes the recognition that, as our Supreme Court has repeatedly instructed, parole cannot be denied without a consideration of the interrelationship of all relevant facts and factors. (*Shaputis II, supra,* 53 Cal.4th at p. 225; *Prather, supra*, 50 Cal.4th at p. 255; *Lawrence, supra*, 44 Cal.4th at p. 1212.) ...
>
> For all of these reasons, we conclude that we must employ the same remedy utilized in *Criscione II, supra*, 180 Cal.App.4th at page 1461, *DeLuna, supra*, 126 Cal. App.4th at page 598, *Smith, supra*, 114 Cal.App.4th at page 373, and *Capistran, supra*, 107 Cal.App.4th at pages 1306-1307. Because the Board's decision (1) reflected its consideration of only two unsuitability factors, the first of which was not supported by any evidence and the second of which relied significantly on the first; (2) did not reflect the Board's consideration of all relevant facts and factors; and (3) included a flawed analysis of the sufficiency of Butler's parole plans, we cannot say that, had the Board appreciated the deficiencies in its decision, it clearly would have denied a parole date based on the state of his parole plans alone. To the contrary, given all of the suitability factors that weighed in Butler's favor and the absence of any regulatory unsuitability factors, including his long history without violence and his having already then served 23 and a half years for a crime whose base term might be as low as 16 years, and certainly no more than 21 years, we doubt that it would have. Accordingly, we grant the petition, vacate the Board's decision, and order the Board to conduct a new parole-suitability hearing in accordance with due process of law.

A dissenting Justice found that Butler's "low-moderate" risk evaluation, and several findings as to gaps in his parole plans, easily met the "modicum" of evidence test set forth by *Lawrence*, and would have denied the petition.

On April 9, 2014, the District Attorneys of San Diego and Sacramento counties filed requests with the California Supreme Court (Case No. S217457) to depublish the opinion.

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ANOTHER NEW HEARING ORDERED WHEN "SOME EVIDENCE" DID NOT SUPPORT ONE OF TWO REASONS USED TO DENY PAROLE

In re Kenneth Ferguson

(unpublished)
CA4(1) No. D064600 (April 7, 2014)

In CLN #48, we reported on *Ferguson I*, wherein the Court of Appeal reversed the Board's denial of parole to Kenneth Ferguson.

> 70-year-old Kenneth Ferguson was denied parole in August 2010 for five years, after serving 16 years on a life sentence for the torture beating of his wife. Notwithstanding that he had no prior record, no prison disciplinaries, an impressive record of self-help programming, and favorable psychological reports, the Board denied him based on a sense it gained during the hearing that his remorse was not genuine, that he was "cold" and unchanged, and that he overintellectualized his explanations of why he committed his offense.
>
> A divided Court of Appeal ruled that the Board failed to articulate a nexus between his current behavior and that attending his crime, and that it therefore failed to meet that test, as mandated by *In re Lawrence*.

At Ferguson's remanded hearing from the earlier decision, he was still denied parole. Represented by attorney Marc Norton, Ferguson was again recently granted habeas relief, albeit to have yet another hearing. The Court majority's analysis rebuffed the Board's conclusion that Ferguson "lacked insight."

MICHELE GARFINKEL

ATTORNEY AT LAW

AGGRESSIVE * KNOWLEGEABLE * EMPATHETIC

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J.B. - 2nd degree Murder, 21-life (1989); 8th hearing (CSP-SOL)

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TC -- Published in "The Uncaged Voice" 4th quarter, 2013 (CCWF)

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In summary, the Board did not reason that Ferguson's credibility issues regarding his prior employment impacted his overall credibility. Even if the Board had used such reasoning as a basis for concluding that Ferguson lacked insight into the causative factors of his conduct, the existence of some evidence supporting a lack of insight is not the end of the analysis. There must be some connection between the lack of insight and the Board's conclusion that Ferguson is currently dangerous. We find no rational connection. All of the experts who evaluated Ferguson concluded he did not pose a security risk. The Board's determination that Ferguson is currently dangerous cannot be predicated upon "a hunch or intuition." (*Lawrence, supra*, 44 Cal.4th at p. 1213.) Our review of the new evidence and the entire record does not reveal a rational basis supported by some evidence to support the Board's conclusion that Ferguson will pose an unreasonable risk to public safety if paroled.

Although not addressed by the parties, we must comment on the Board's stated reasoning for denying parole: "Today the Panel was unable, with any degree of confidence, to determine your predictability, leaving the Panel with the conclusion that this . . . predictability issue . . . does impact your current risk of danger." Our review of the entire record does not support the Board's conclusion that Ferguson is unpredictable and a danger to the public for this reason. Ferguson is college educated, has no history of drug use or alcohol abuse, has no juvenile record and the life crime is his only adult conviction. Other than the recent counseling chrono, Ferguson has no history of prison discipline. Additionally, the Board acknowledged Ferguson's numerous accomplishments and letters of support. We find no evidence in the record to support the Board's conclusion that Ferguson presents as unpredictable and thus currently dangerous.

The Court put some teeth in its new order:

The relief sought in the petition for writ of habeas corpus is granted. The Board is directed to vacate its decision denying parole and thereafter proceed in accordance with due process of law and consistent with the decision of this court. (*Prather, supra*, 50 Cal.4th 238.) The Board is bound by our "findings and conclusions regarding the evidence in the record" and by our "conclusion that no evidence in the record before [us] supports the

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> Board's determination that [Ferguson] is unsuitable for parole." (*Id.* at p. 258.) The Board is precluded from again denying parole unless some additional evidence, considered alone or in conjunction with other evidence in the record, and not already considered and rejected by us, supports a determination that Ferguson remains currently dangerous. (*Ibid.*) In the interests of justice, this decision is made final as to this court seven days from the date of filing. (Cal. Rules of Court, rule 8.387(b)(3)(A).)

In his dissent, Presiding Justice McConnell reviewed the same evidence he found in *Ferguson I* to provide the modicum of evidence to support the Board's decision. That evidence was the statements in the Board's FAD psych evaluation which the Board weighed more heavily than the conclusions of Dr. Daisy Switzer, a privately retained psychologist. Justice McConnell emphasized that while the two evaluations differed in their conclusions, it was within the Board's discretion to weigh one more heavily than the other, as long as one decision was not facially unreasonable. The Court majority's decision to disregard this weighing fell outside the authority of judicial review of Board decisions, McConnell said. He would have again denied the petition.

> The majority does not cite to any authority, nor am I aware of any, requiring the Board to establish the requisite rational nexus with technical precision. In my view, the Board articulated the requisite rational nexus by explaining Ferguson's lack of credibility on the issues of insight and remorse made his current dangerousness too unpredictable for the Board to confidently release him into the community.

While the Board's remarks about why it denied Ferguson parole may not have been artful, this does not make them inadequate. The adequacy of a statement of reasons is determined by whether the statement furthers its desired ends. (*In re Pipinos* (1982) 33 Cal.3d 189, 198.) In the parole context, the desired ends of a statement of reasons are to "guard against careless decisions," inform inmates "of the reasons why parole was denied," and aid judicial review. (*In re Sturm* (1974) 11 Cal.3d 258, 270.) As the Board's decision accomplishes each of these ends, it is procedurally adequate.

Lastly, as I noted in my dissent in the prior appeal, the Supreme Court has specifically reminded this court, "While the evidence supporting a parole unsuitability finding must be probative of the inmate's current dangerousness, it is not for the reviewing court to decide which evidence in the record is convincing. [Citation.] Only when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (*In re Shaputis II, supra*, 53 Cal.4th at p. 211.) As I continue to find nothing arbitrary about the Board's decision and I am still not persuaded the only decision to be drawn from the record is that Ferguson is not presently dangerous, I cannot join in the majority's opinion.

This case is not over. 71 year-old Ferguson must again face a Board that has been persistent in denying him parole in, now, six hearings.

***

U.S.D.C. CERTIFIES CLASS IN § 1983 SUIT CHALLENGING PSYCH EVAL PROTOCOLS

Johnson v. Shaffer
USDC, ED Cal., No. 12-cv-1059
KJM AC
March 31, 2014

In a 42 USC § 1983 federal civil rights suit challenging the constitutionality of the Board's protocols in making FAD psychological evaluations for lifer parole hearings, the Court certified the class as well as narrowed the scope of the continuing suit. The Court noted that this case, in respect to whom it covers, is "indistinguishable" from *Gilman v. Schwarzenegger*, and for the same reasons, covers the same class, i.e., parolable lifers.

The brief essence of the suit was stated in the Complaint.

> Plaintiff challenges the constitutionality of the protocol adopted by the Board of Parole Hearings' Forensic Assessment Division ("the FAD protocol") for the preparation of psychological evaluations to be considered in determining prisoners' suitability for parole. The complaint alleges that defendants, California officials including the heads of the Department of Corrections and Rehabilitation ("CDCR"), Board of Parole Hearings ("BPH"), and BPH Forensic Assessment Division ("FAD"), all of whom are sued in their official capacities only, deliberately adopted a protocol requiring *inter alia* the use of three risk assessment tools that they knew to be unreliable. According to plaintiff, "The primary purpose of establishing the FAD and implementing the new protocol was to prejudice lifers appearing before the Board by making it harder for them to obtain a favorable psychological

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evaluation, harder to obtain and favorable parole determination and harder to establish a favorable administrative record for challenging parole decisions in court."

The Court also made some preliminary orders narrowing the scope of the suit. It found that the ruling in *Swarthout v. Cooke* ___ U.S. ___, 131 S. Ct. 859 (2011), a habeas case dealing with denial of liberty from adverse BPH decisions, did not apply in the civil rights suit context here.

Defendants argue broadly that after *Swarthout*, "federal review of California state parole decisions is limited to ensuring that fair procedures were employed to protect the inmate's state created liberty interest." ECF No. 30-1 at 15. This formulation overstates the scope of the *Swarthout* holding, which is limited to the habeas context in which it arose. This is not a habeas case, and plaintiff does not seek to have his 2010 parole denial set aside. *Swarthout* has no effect on the continuing viability of *Wilkinson v. Dotson,* 544 U.S. 74 (2005), which holds that inmates may challenge the constitutionality of state parole procedures under section 1983. Here as in *Wilkinson*, plaintiff challenges the process by which the state assesses parole suitability, but does not seek an injunction ordering his immediate or speedier release into the community. See id. At 82. *Swarthout* limits federal habeas review of individual parole decisions, but does not foreclose section 1983 challenges to the process by which a state assesses parole suitability. Accordingly, *Swarthout* does not preclude the claims presented here. ...

Moreover, the gravamen of the First Amended Complaint remains the assertion that the FAD protocols were adopted (and operate) to create an evidentiary basis for the denial of parole by generating unreliable future dangerousness findings, rendering the suitability evaluation process biased and inherently unreliable. This theory does not require that defendants set out to contrive a deficient protocol; it is equally supported by plaintiff' allegations that defendants adopted the protocol with knowledge of its biases and unreliability. Plaintiff's discovery response therefore does not constitute an admission that negates his claim.

For these reasons, defendants' blanket reliance on *Swarthout* and *Greenholz* should be rejected and the motion for summary judgment on this ground should be denied. This ruling should be without prejudice to future consideration of *Greenholz* as it may apply to plaintiff's individual causes of action.

This appeal concerns only defendant's sentencing. Less than one month after defendant was sentenced, and thus before the judgment was final, the California electorate approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which provides that, with certain exceptions, a three strike term of 25 years to life may be imposed only if defendant's current offense is a serious or violent felony. Domestic battery resulting in a traumatic condition is not deemed a serious or violent felony. (see §§ 667.5, subd. (c), 1192.7, subd. (c).) Defendant contends that under the analysis set forth in *In re Estrada* (1965) 63 Cal.2d 740 (Estrada), the more lenient sentencing change applies retroactively to defendant and he is entitled to be resentenced. We agree and remand for resentencing. ...

The Court next denied plaintiff's Equal Protection, Eleventh Amendment, and Pendent State Law claims, as a matter of law. Defendants' motions for summary judgment on other grounds were denied without prejudice to their renewal after completion of discovery in the case.

Finally, having certified the class, the Court then ordered normal proceedings to enable discovery and further permit prosecution of the suit. Unless and until a final decision is rendered in this suit, the Board is under no obligations to make changes to its FAD psych evaluation protocols.

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16-YEAR OLD WHO RECEIVED LWOP ENTITLED TO NEW SENTENCING HEARING TAKING INTO ACCOUNT HIS YOUTH

In re Clyde Rainey

___Cal.App.4th ___; CA 1(1);
Case No. A138921
February 28, 2014

In an important ruling, the Court of Appeal held that the recent US Supreme Court case, *Miller v. Alabama*, applies *retroactively* to cases on collateral review [such as habeas corpus]; recently enacted state law "recall procedures" for juvenile LWOP sentences do not moot the constitutional issue, as these procedures do not fully track *Miller*.

Petitioner Clyde James Rainey seeks habeas relief under *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407, 132 S.Ct. 2455] (Miller), which holds mandatory life imprisonment without parole (LWOP) for those under the age of 18 at the time of their crimes violates the Eighth Amendment prohibition on cruel and unusual punishment. We conclude *Miller* applies retroactively to cases on collateral review and further con-

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clude Rainey is entitled to habeas relief. We therefore grant the petition for writ of habeas corpus, vacate the sentence, and remand for resentencing in a manner consistent with the views expressed herein.

The appellate court relied on the principal holdings of *Miller*, which require consideration of one's youth at an LWOP-possible sentencing hearing.

Most recently, in *Miller*, the Supreme Court held any sentencing scheme that "mandates life in prison without possibility of parole for juvenile offenders" is also forbidden under the Eighth Amendment. (*Miller, supra*, 132 S.Ct. at p. 2469.) The court reasoned: "*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Id*. at p. 2468.)

After a detailed analysis, the court reached the principal legal conclusion of this case, that under *Teague v. Lane's* exceptions, retroactivity of the principles lately announced in *Miller* are available on habeas corpus here.

We therefore conclude *Miller* announced a new substantive rule that applies retroactively to cases on collateral review.

Turning to the merits, the Court found that Rainey was entitled to habeas corpus relief.

Nevertheless, we conclude Rainey is entitled to habeas relief on the second ground asserted. The record demonstrates the sentencing judge imposed LWOP on the basis of several factors, including Rainey's lengthy juvenile court record, the jury's special circumstance finding that he committed murder during a robbery, the jury's finding Rainey personally used a firearm during the commission of the crime, and the court's determination he "knew what he was doing and . . . knew the danger in which he was involved." Missing from the court's sentencing discourse is a full consideration of the factors, now constitutionally mandated under *Miller,* related to "the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Miller, supra,* 132 S. Ct at p. 2465.) Because Miller requires sentencing courts to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" (*id*. at p. 2469), and the trial court here

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did not consider the "hallmark features" of youth now mandated under *Miller* (*id.* at p. 2468), we conclude habeas relief must be granted.

Importantly, the Court rejected the state's claim that recent statutory changes enabling a youthful LWOP a parole hearing after 25 years doesn't cure the problem.

We reject the Attorney General's contention that habeas relief should be denied because Rainey "now has the possibility of parole" under section 1170, subdivision (d)(2). This subdivision, enacted in 2012, provides a "recall" procedure for a juvenile LWOP sentence, after a period of 15 years. (§ 1170, subd. (d)(2)(A)(i) ["When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing."].) ...

We cannot square Section 1170, subdivision (d)(2)'s petitioning process—at the soonest 15 years after sentencing—with the import of the Supreme Court's discussion and analysis in *Miller.* The statute effectively makes *Miller's* mandate irrelevant to our sentencing courts, under the rubric that constitutionally mandated youth sentencing factors can be deferred at a minimum for a decade and a half. We do not believe the high court had in mind any such deferral of constitutionally required sentencing considerations, particularly since the court envisions that such consideration will result in the harshest of sentences being "uncommon."

The Court expounded on its crucial distinction between (A) consideration of youth *at sentencing* and (B) consideration of rehabilitation of that youth *at a parole hearing*.

Furthermore, there is no guarantee that a petition seeking recall and resentencing under section 1170, subdivision (d)(2), will be heard on the merits. Rather, a hearing is conditioned on the defendant "describing his or her remorse and work towards rehabilitation" and stating that one of the following four circumstances is true: (1) he or she "was convicted pursuant to felony murder or aiding and abetting murder provisions"; (2) he or she does not have other prior juvenile felony adjudications "for assault or other felony crimes with a significant potential for personal harm to victims"; (3) he or she "committed the offense with at least one adult codefendant"; or (4) he or she "has performed acts that tend to indicate rehabilitation or potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse." (§ 1170, subd. (d)(2)(B)(i)–(iv).) Nothing in *Miller* remotely suggests that a juvenile must make a threshold showing of some sort before a sentencing court is constitutionally required to consider the implications of his or her youth.

Additionally, even when a section 1170, subdivision (d) petition is heard on the merits, the enumerated factors the court may consider in deciding whether to resentence the defendant do not embrace the totality of the considerations the Supreme Court discussed in *Miller, Roper* and *Graham*. In addition to the factors, except rehabilitation efforts, just mentioned (§ 1170, subd. (d)(2)(F)(i)–(iii)), a court ruling on the merits of a recall petition may consider: whether, prior to the crime, the defendant "had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress" (*id.*, subd. (d)(2)(F)(iv)); whether the defendant "suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense" (id., subd. (d)(2)(v)); whether the defendant "has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved in crime" (id., subd. (d)(2)(F)(vii)); and whether the defendant "has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor" (*id.*, subd. (d)(2)(F)(viii).

These factors describe what might be called causative agents of criminal conduct, i.e., lack of parental supervision or positive adult role models, and mental or physical impairment. Missing from this list is the fundamental fact of youth, and its attendant attributes, on which the Supreme Court has focused—"*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing." (*Miller, supra*, 132 S. Ct. at p. 2464.) Youth, the court has said, " 'is more than a chronological fact.' " (*Id.* at p. 2467, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115 [71 L.Ed.2d. 1, 102 S. Ct. 869].) "It is a time of immaturity, irresponsibility, " 'impetuousness[,] and recklessness.' " (*Miller,* at p. 2467, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 368 [125 L.Ed.2d 290, 113 S. Ct. 2658].) Thus, "a sentencer misses too much if he treats every child as an adult." (*Miller,* at p. 2468.) While section 1170, subdivision (d)(2)(I), provides that a court hearing a recall petition "may" also "consider any other criteria

Rainey from pg. 10

that the court deems relevant to its decision, " this proviso neither identifies, nor requires the court to consider, the inherent "mitigating qualities of youth" which the Supreme Court has instructed must be considered before imposing a State's harshest penalties. (*Miller*, at p. 2467.)

The Court's disposition was short and sweet:

The petition for habeas corpus is granted. Petitioner's LWOP sentence is vacated and the matter is remanded for resentencing.

Predictably, the state filed a Petition for Review in the CA Supreme Court.

HOWEVER, SEE THE NEXT CASE, WHICH APPEARS TO BE IN TENSION WITH RAINEY. THIS QUESTION WILL LIKELY RESULT IN REVIEW BY THE CALIFORNIA SUPREME COURT.

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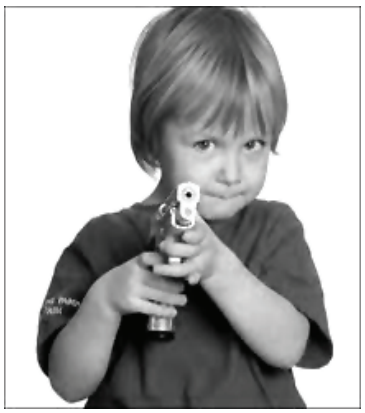


ON DIRECT APPEAL (NOT HABEAS), A 16-YEAR-OLD RECEIVING 50-LIFE IS NOT ENTITLED TO MILLER RELIEF BECAUSE NEWLY ENACTED PC § 3051 CURES ANY CONSTITUTIONAL DEFECT

People v. Tyrus Franklin

___Cal.App.4th ___; CA 1(3);
Case No. A135607
February 28, 2014

On the same date that *Rainey* was decided in Division 1 of the First Appellate district, Division 3 held, *on direct appeal of the conviction*, that because Tyrus Franklin would gain the benefit of a parole hearing in as little as 15 years under newly enacted PC § 3051, resentencing was not required.

Franklin, 16 at the time of the offense, was convicted of murder with use of a gun. He was sentenced to 50-life. On appeal he claimed his sentence was the equivalent of LWOP, and was cruel and unusual punishment, citing *Miller v. Alabama* (2012) 567 U.S. __, and People v. Caballero (2012) 55 Cal.4th 262.

The court declined to decide whether 50-life was a de facto LWOP; it assumed the sentence, when imposed, violated the Eighth Amendment. However, the court found remand was not required, because the enactment of Senate Bill 260, which added Penal Code section 3051, cures any constitutional defects. The law establishes a parole eligibility mechanism that provides a defendant serving a sentence for crimes committed as a juvenile a meaningful opportunity for release when he has shown he is rehabilitated and has gained maturity. Acknowledging that Courts of Appeal are divided on the effect of section 3051 on Eighth Amendment challenges to sentences, the court here found that *Miller* does not require the trial court at the time of initial sentencing to determine when a juvenile offender should be eligible for parole. The new parole eligibility of section 3051 means appellant no longer faces the functional equivalent of an LWOP term for an offense committed when he was a juvenile.

Thus, the *Franklin* court declined to order resentencing on *Franklin's* direct appeal of his conviction, but the *Rainey* court, reviewing a habeas attack on a 1999 conviction, found that the new law didn't "track" *Miller*, in that a later parole board consideration of one's youth did not equate to the command of resentencing consideration before the minimum term to parole had been served. Stated another away, if Franklin were to now file a *habeas petition* asserting his rights under *Rainey*, he might be better placed than when he was on direct appeal – if he can get his case heard before Division 1.

The *Franklin* court, after presuming, without deciding, that 50-Life was an equivalent LWOP for a prisoner whose parole eligibility would not occur until he was age 66, found that newly enacted PC § 3051 cured any error, and denied relief on direct appeal of his conviction.

We believe that the procedure adopted in Penal Code section 3051 is preferable to the determination of parole eligibility dates for juvenile offenders when they are sentenced. The underlying rationale for constitutionally requiring that juvenile offenders be afforded an opportunity for meaningful parole is that many will outgrow the youthful characteristics responsible for their criminal conduct and with maturity become capable of leading constructive and law-abid-

Franklin from pg. 11

ing lives. (*Miller, supra*, 567 U.S. at pp. ___ [132 S.Ct. at pp. 2464-2465].) Whether a particular juvenile acquires the maturity and insight to justify parole certainly can be determined more intelligently and more fairly with the passage of time, rather than by a prediction at the time of sentencing. The statute provides predictability for most juvenile offenders and relieves trial judges of the great uncertainty inherent in setting an alternative parole eligibility date. (See *Caballero, supra*, 55 Cal.4th at pp. 268-269 [declining to provide trial courts with a precise time frame for setting future parole hearings but requiring sentencing courts to "consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board"].)

Penal Code section 3051 is precisely what the court in *Caballero, supra*, 55 Cal.4th at page 269, footnote 5 urged the Legislature to adopt: "We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." The Legislature has gone further and created a mechanism applicable to most juvenile offenders, including those guilty of homicide crimes. With that mechanism now embedded in the statutory scheme, there is no basis for remanding the matter to the trial court to fix a parole eligibility date which, if not the date prescribed by the new statute, would necessarily be a date plucked from the air without statutory authority or precise criteria.

Similarly, we also disagree with the court in Heard that the remote possibility that Penal Code section 3051 might be replaced or repealed requires that we disregard its current applicability. Should this unlikely event occur, it will be time enough to consider appropriate relief, whether by petition for habeas corpus or other appropriate means.

In short, because defendant no longer faces the functional equivalent of life without the possibility of parole for the crime he committed as a juvenile, he is not entitled to a new sentencing hearing under Miller or remand under *Caballero* to determine the time for parole eligibility.

Predictably, Franklin filed a Petition for Review in the CA Supreme Court. Stay tuned!

***

JUVENILE LWOP WITH MULTIPLE STRIKES DENIED RESENTENCING RELIEF UNDER WRONG LAW

People v. Byron Scott
CA 4(2); Case No. E058840
March 7, 2014

If you were a juvenile when sentenced to LWOP, and apply for resentencing under *Miller*, the court must decide the case based using PC § 1170(d)(2)(A)(i), not Prop. 36's Three-Strikes PC § 1170.126.

Byron Scott was convicted of numerous determinate sentences for serious felonies, and also of multiple murders. He was just short of 18 at the time of the crimes. Accordingly, under the new law, he petitioned for resentencing of his consecutive LWOP terms for the murders.

The superior court denied relief, but based its decision on PC § 1170.126 – the new law pertaining to recall of sentences for a limited class of Three Strikers. Scott appealed.

On March 27, 2013, approximately 17 years after beginning to serve his sentence, defendant filed a petition with the superior court to recall his sentence pursuant to Penal Code section 1170, subdivision (d)(2). That provision states, in relevant part, that "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing." (Pen. Code, § 1170, subd. (d)(2)(A)(i).)

Here, the superior court treated defendant's petition as if it were one to recall a sentence under the "Three Strikes" law (Pen. Code, § 1170.126). The court denied the petition, noting first that defendant was not sentenced under the Three Strikes law, and second that he would have been ineligible for resentencing under Penal Code section
1170.126, because his current offenses include two counts of murder.

Defendant appeals, contending that the superior court failed to exercise its discretion properly, because it erroneously treated defendant's petition for recall of sentence as one under Penal Code section 1170.126, rather than under Penal Code section 1170, subdivision (d)(2).

Scott from pg. 12

The Court of Appeal reversed and remanded. It ordered the superior court to decide the resentencing petition under the correct legal authority.

> Because the trial court here mistakenly considered defendant's petition as if it were one for recall of a three strikes sentence, and not one under Penal Code section 1170, subdivision (d)(2), it failed to properly exercise its discretion in considering the relevant statutory criteria for recall of defendant's sentence. "An erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion." (*People v. Bruce* G. (2002) 97 Cal.App.4th 1233, 1247.)
>
> DISPOSITION
> The denial of defendant's petition to recall his sentence is reversed. The matter is remanded to the superior court with directions to properly exercise its discretion under Penal Code section 1170, subdivision (d)(2), and the relevant criteria stated there.

***

JUVENILE 50-LIFE SENTENCE MODIFIED TO REQUIRE PAROLE HEARING AFTER 25 YEARS

People v. Wesley Solis

___Cal.App.4th ___; CA 4(3);
Case No. G048019
March 11, 2014

Wesley Solis was 17 when he was sentenced to 50-life for murder with use of a gun. At his sentencing hearing, the judge explained that while Solis was eligible for LWOP because of "special circumstances," this was not such a case, and he declined to hand down that sentence. Solis now asks for relief from his 50-life sentence as a de facto cruel and unusual LWOP sentence, under *Miller*.

The Court of Appeal found that recently enacted PC § 3051 cured Solis' problem by giving him an earlier chance at release via a parole hearing after 25 years. Solis complained that the law might change in the interim, and he would not get that benefit. The Court reviewed the sentencing record, and concluded that Solis was found to be "reformable," and that the trial judge intended him to be eligible for parole. To salve Solis's worries, the Court of Appeal remanded the case to the trial court to amend the sentence to expressly include parole eligibility after 25 years.

> Under the Eighth Amendment, juvenile offenders who commit homicide cannot be sentenced to prison for life without the possibility of parole (LWOP), except in the rare case where their crimes reflect irreparable corruption and they have no prospects for reform. Although appellant was convicted of special circumstances murder, and was
> thus statutorily eligible for LWOP, the trial judge determined he did not come within the small class of juvenile offenders who are deserving of this most serious of punishments.
>
> While recognizing appellant's crime was very serious, the judge stated, "I don't see [appellant] as an individual [who] at one month into his 17th birthday is so evil, that his crime reflects irreparable corruption. I just don't see it that way." But, immediately after sparing appellant a straight LWOP sentence, the judge turned around and sentenced him to 50 years to life in prison.
>
> For constitutional purposes, we discern no material difference between a sentence of LWOP and 50 years to life. Because appellant's sentence deprives him of a meaningful opportunity for parole, it is facially unconstitutional. However, in addressing the issue of juvenile sentencing, the Legislature has recently decreed that offenders such as appellant shall be afforded a parole hearing after serving 25 years in prison. This legislation gives appellant what the Constitution compels: A meaningful opportunity to demonstrate maturity, rehabilitation and fitness to reenter society at some point in the future. The legislation is designed to apply to appellant's sentence by operation of law, but to ensure he receives the benefit of the statute, we will modify his sentence to include a minimum parole eligibility date of 25 years. In all other respects, we affirm the judgment.

***

JUVENILE 76-LIFE SENTENCE HELD NOT FUNCTIONAL EQUIVALENT OF LWOP; RELIEF UNDER PC 1170(d)(2) DENIED

People v. Manuel Flores

___Cal.App.4th ___; CA 4(1);
Case No. D064350
February 21, 2014

In this case, the Court of Appeal considered whether PC § 1170, subdivision (d)(2), regarding a juvenile offender's ability to petition for recall of his sentence, applies to a juvenile offender serving a long-term sentence that is not technically life without parole (LWOP). It concluded that it does not.

> Flores was approximately 17 and one-half years old when he committed the crimes. He was convicted of three counts of first

Flores from pg. 13

degree murder, premeditated attempted murder, robbery, burglary and conspiracy to commit robbery. Flores was sentenced to three consecutive terms of 25 years to life in prison for the first degree murder convictions plus one year for a knife allegation. He was also sentenced to a term of life in prison for the attempted murder. The court stayed all other determinate term sentences pursuant to section 654. Box, an adult when the crimes were committed, was sentenced to death

.

After serving approximately 22 years in prison, Flores petitioned the trial court to recall his sentence under section 1170(d)(2). The People opposed Flores's petition, contending section 1170(d)(2) was inapplicable because he was not sentenced to LWOP. Flores argued the statute was applicable to him because his sentence of 76 years to life was the functional equivalent of LWOP.

The trial court granted Flores's petition and thereby recalled his sentence. The court also set the matter for a resentencing hearing.

The Court conducted an extensive analysis of the legislation creating § 1170(d)(2), and concluded that the Legislature was well aware of the difference between *actual* LWOP sentences, and *de facto* LWOP sentences at the time. Accordingly, the court found that Flores had no action for a recall of sentence under PC § 1170(d)(2). It did note, parenthetically, that Flores was eligible for consideration of a parole hearing under PC § 3051.

The Court recounted the two relevant statutes.

In September 2012, California enacted Senate Bill No. 9 (SB 9), which amended section 1170 by adding subdivision (d)(2). (Stats. 2012, ch. 828, § 1.) That subdivision provides: "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing." (§ 1170, subd. (d)(2)(A)(i), italics added.)

One year later, California enacted Senate Bill No. 260 (SB 260), which added section 3051, providing that "any prisoner who was under 18 years of age at the time of his or her controlling offense" shall be afforded a "youth offender parole hearing." (Stats. 2013, ch. 312 (S.B. 260); § 3051, subds. (a)(1), (d).) Under the new law, a juvenile offender with a determinate sentence of any length shall be eligible for release on parole at a hearing during his or her 15th year of incarceration; a juvenile sentenced to an indeterminate term of less than 25 years to life would be eligible for release on parole at a hearing during his or her 20th year of incarceration; and a juvenile sentenced to an indeterminate term of 25 years to life would be eligible for release on parole at a hearing during his or her 25th year of incarceration. (§ 3051, subd. (b).) Section 3051 does not apply to individuals sentenced to life in prison without the possibility of parole. (§ 3051, subd. (h).)

After analyzing the legislative history of SB9 and SB260, the Court concluded that the Legislature did not intend those sentenced to "actual" LWOP were entitled to a recall of sentence, if they were juveniles at the time the offense(s) were committed.

Based on the foregoing, we conclude section 1170(d)(2) does not apply to offenders sentenced to long-term indeterminate sentences that are not technically LWOP. Rather, section 3051 applies to those offenders, including Flores. Thus, the trial court erred in granting Flores's petition under section 1170(d)(2).

Accordingly, the Court issued a writ of mandate

directing the superior court to vacate its order recalling Flores's sentence under section 1170(d)(2) and setting a resentencing hearing. The trial court is directed to enter a new order dismissing Flores's petition for recall and resentencing. The stay issued by this court on August 8, 2013 is vacated.

***

APPELLATE COURTS CONTINUE TO DECLINE PROP. 36 RELIEF TO NON-QUALIFYING APPLICANTS

Prisoners sentenced to life-terms under the Three Strikes law continue to pepper the appellate courts with requests for relief under Prop. 36, even though it is plain that they are barred because of prior serious/violent convictions. CLN is summarizing some of these cases below in hopes of educating potential applicants of the futility of trying to gain relief when they simply do not qualify. The following excerpts are from recent court rulings, without identifying the names of the applicants.

PROP 36 Cases from pg. 14

Case No. 1

Defendant appeals from an order denying his petition to recall his indeterminate life sentence under Penal Code section 1170.126. We find no arguable issues and affirm.

In 1998, defendant pled guilty to second degree robbery and admitted he had been previously convicted of two prior serious or violent felonies. (§§ 211, 667, subds. (b)-(h), 1170.12.) He was sentenced to prison for an indeterminate term of 25 years to life, as was then authorized under the "Three Strikes" law. (Former §§ 667, subd. (e)(2)(A), as amended by Stats. 1994, ch. 12, § 1, eff. Mar. 7, 1994; 1170.12, subd. (c)(2)(A), added by Prop. 184, § 1, approved Nov. 8, 1994; *People v. Superior* Court (*Kaulick*) (2013) 215 Cal. App.4th 1279, 1285.) As a condition of defendant's plea, the People dismissed additional allegations that could have added 25 years to his sentence.

Defendant appealed from the original judgment, arguing his sentence amounted to cruel and unusual punishment. This court rejected that argument and affirmed the judgment in December 20, 1999.

On November 6, 2012, the electorate passed Proposition 36, known as the Three Strikes Reform Act. The ballot measure amended sections 667 and 1170.12 to provide that, subject to certain exceptions, a defendant with two prior serious or violent felony convictions is subject to a sentence of 25 years to life only if the current felony is also a serious or violent felony. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1292-1293.) It also enacted section 1170.126, which permits certain prisoners who are currently serving an indeterminate life term as a third strike offender to petition for a recall and resentencing as a second strike offender. (§ 1170.126, subds. (a), (b) & (e)(1); *Kaulick*, at p. 1286.) A prisoner is not eligible for resentencing under section 1170.126 when he or she is serving the indeterminate term for a serious or violent felony as defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c). (§ 1170.126, subd. (e)(1).)

Defendant filed a petition to recall his sentence on December 10, 2012. The court denied that petition on January 15, 2013, on the ground the current offense of second degree robbery was a serious and violent felony. On September 17, 2013, defendant filed a "motion to amend the petition for recall of sentence," accompanied by an amended petition arguing that his commitment offense was a petty theft rather than a robbery. The court denied this motion on September 25, 2013, "for the reason that such amendment does not change the fact this case is not within the class of cases described by the Three Strikes [Reform] Act of 2012." Defendant filed a notice of appeal on October 17, 2013.

II. DISCUSSION

It is unclear whether an order denying a petition for recall under section 1170.126 is appealable, and that issue is currently under review in the Supreme Court.

Even if we assume this appeal is properly before us, the trial court correctly denied defendant's section 1170.126 petition. The recall procedure created by that statute is not available to a defendant whose current conviction is for a serious or violent felony as defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c). (§ 1170.126, subd. (e)(1).) Defendant's current conviction is for second degree robbery, which qualifies as both a serious and a violent felony. (§§ 1192.7, subd. (c)(19), 667.5, subd. (c)(9).)
Defendant seeks to avoid this basic problem by arguing in his supplemental brief that his robbery conviction was really a petty theft of $100, and that he pled guilty to the wrong offense. As this court noted in its prior opinion in the appeal from the original judgment, "[Defendant] entered a convenience store and robbed the clerk of hundreds of dollars, precipitating a dangerous physical battle between the clerk and his customers and [defendant]. The commission of this offense was obviously planned and premeditated by [defendant]. Under California law, the current offense qualifies as a 'serious felony,' and not a mere 'theft offense.' "

III. DISPOSITION

The judgment (order denying defendant's motion to amend the petition for recall of sentence) is affirmed.

Case No. 2

On July 18, 2013, [petitioner] filed a petition for recall of sentence pursuant to Penal Code section 1170.126, which codifies part of the "Three Strikes Reform Act" (Prop. 36). In his petition, [petitioner] represented that he is serving a third-strike sentence for a 1999 conviction for second degree robbery under section 211. On July 26, 2013, the trial court denied the petition with prejudice because [his] third-strike offense of second degree robbery is a violent felony conviction, which renders him ineligible for resentencing under section 1170.126. [Petitioner] filed a notice of appeal.

We have examined the entire record and determined that, because [petitioner's] third-strike offense of second degree robbery is a violent felony (§ 667.5, subd. (c)(9)), he cannot benefit from the provisions of section 1170.126. (§ 1170.126, subds. (b) & (e)(1).)

Cases-from pg. 15

Case No. 3

[Appellant] appeals from an order denying his request for resentencing under Penal Code section 1170.126.

In 2000, [appellant] was convicted of robbery (§ 211) with three serious felony prior convictions (§ 667, subd. (a)(1)); three prison priors (§ 667.5, subd. (b)) and three serious/violent felony prior convictions (§ 667, subds. (b)-(i)). The trial court denied [his] motion to strike the serious/violent felony prior convictions and sentenced him to an indeterminate term of 41 years to life in prison.

In May 2013 [appellant] petitioned for resentencing under section 1170.126. The trial court denied the petition finding [him] ineligible for resentencing because his conviction was for a serious felony. [He] filed a timely notice of appeal.

DISCUSSION
Pursuant to *Anders, supra,* 386 U.S. 738, the brief identifies possible, but not arguable issues:

1. Is the order denying the petition for recall appealable?

2. Is [appellant] ineligible for recall?

While the issue raised in No. 1 above is arguable, given the fact that [appellant] is plainly ineligible for recall under section 1170.126, subdivisions (b) and (e), section 1192.7, subdivision (c)(19) makes any dispute about whether the denial is appealable moot.

The judgment is affirmed.

Case No. 4

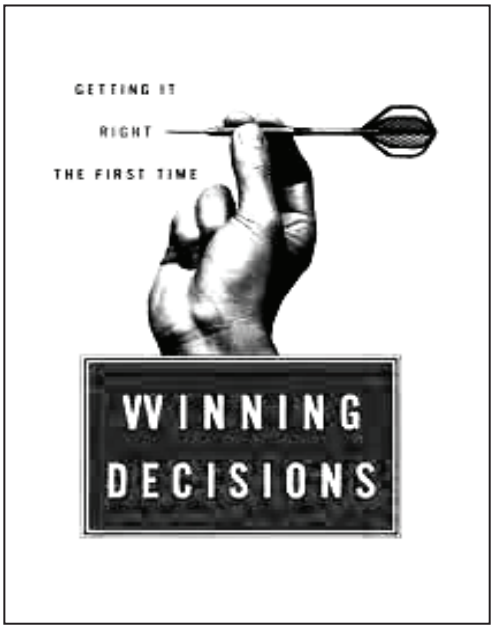
On August 21, 1996, following a jury trial, defendant and appellant [ ]was convicted of first degree residential burglary under Penal Code section 459. On December 13, 1996, the trial court sentenced defendant to a total term of 25 years to life.

On March 21, 2013, defendant filed an in pro. per. petition for resentencing under section 1170.126. On August 21, 2013, the trial court denied the petition. The court noted that defendant's commitment offense was for first degree residential burglary, a serious felony. The court therefore found that "defendant [was] not eligible for resentencing under PC1170.126."

Defendant filed a timely notice of appeal on the denial of his petition.
We have conducted an independent review of the record and find no arguable issues.

The judgment is affirmed.

Cases from pg 16



Case No. 5

This is an appeal from the denial of a petition for recall of sentence pursuant to Penal Code section 1170.126. Defendant was sentenced on October 29, 2007, to an indeterminate sentence of 25 years to life for attempted second-degree robbery. The superior court denied his petition with prejudice on the ground that relief under section 1170.126 is not available to defendants serving sentences for convictions of serious or violent felonies within the meaning of subdivision (c) of section 1192.7. Defendant appealed.

We have examined the entire record and are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. Under subdivision (c)(19) of section 1192.7, robbery is a serious or violent felony. Under subdivision (c)(39) of section 1192.7, "any attempt to commit a crime listed in this subdivision other than an assault" is a serious or violent felony. Attempted second-degree robbery is therefore a serious or violent felony within the meaning of subdivision (c) of section 1192.7. Defendants serving sentences for convictions of felonies defined as serious or violent felonies by subdivision (c) of section 1192.7 are not eligible for recall of sentence under section 1170.126. (See, e.g., § 1170.126, subds. (b), (e)(1).) Defendant's petition was therefore properly denied.

We advised Defendant of his right to submit any contentions or issues that he wished us to consider, and he timely filed a supplemental brief. We conclude that he has not presented a meritorious argument for reversal of the trial court's order. Defendant argues that his sentence is grossly disproportionate to the crime for which it was imposed, given the facts of his case. That argument does not, however, address the strict statutory limits that the Legislature placed on a petition for recall of sentence under section 1170.126, which the superior court correctly applied. He also argues that section 1170.126 expressly provides that it is not "intended to diminish or abrogate any rights or remedies otherwise available to the defendant." (§ 1170.126, subd. (k).) That is correct, but it does not mean that such rights may be exercised or such remedies pursued on a petition for recall of sentence under section 1170.126. Defendant is ineligible for relief under section 1170.126, so his petition for recall of sentence under that statute was correctly denied.

The order is affirmed.

Case No. 6

In this case, defendant pled guilty in 1996 to one count of robbery and admitted the firearm use enhancement attached to the count. He also admitted three prior convictions as strike priors. Pursuant to the agreement, the remaining counts and enhancements were dismissed and he was sentenced to state prison for a term of 30 years. On March 12, 2013, defendant filed a form petition for recall of sentence in the superior court pursuant to Penal Code section 1170.126 (Proposition 36). Defendant obtained appointed counsel. He then filed a motion for recall and resentencing under section 1170.126. The new motion conceded defendant was ineligible for relief under Proposition 36 because the third strike was a robbery conviction. Yet, defendant argued a categorical denial of relief under the statute amounted to a denial of equal protection under the federal and California Constitutions. The court denied the motion, and defendant appealed.

Cases-from pg. pg. 17

We received a supplemental letter from defendant indicating his assessment of the matter, acknowledging his past failures and indicating he has reassessed the need to become a more responsible member of society. To attain this goal, defendant plans on attending academic classes and counseling to provide better control over his life plans.

Defendant was initially charged with three counts of robbery (§ 212.5) and firearm use allegations (§ 12022.5, subd. (a)), one count of attempted robbery with a firearm use, and two counts of aggravated assault (§ 245, subd. (a)), vehicle theft (Veh. Code, § 10851, subd. (a)), resisting arrest (Pen. Code, § 148) providing false identification (§ 148.9, subd. (b), evading a police officer (Veh. Code, § 2800.3) and escape from jail (Pen. Code, § 4532, subd. (b)). The information alleged two prior robbery convictions and one prior attempted robbery conviction, all within the meaning of the three strikes law, as well as section 667, subdivision (a) and section 667.5, subdivision (b).

He pled out to one count of robbery and admitted the use of a firearm enhancement for that count. He also acknowledged three prior strike convictions. The remaining counts and enhancements in the information were dismissed. The plea agreement entailed a prison sentence of 30 years to life.

The passage of Proposition 36 amended the three strikes law so that an indeterminate sentence of 25 years to life in prison is applied only where the "third strike" conviction is a serious or violent felony, or where the government alleges and proves other specific factors. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) This reform also added section 1170.126 which permitted inmates sentenced under the prior version of three strikes to petition for a recall of their sentence if they would not have been sentenced to an indeterminate life sentence under these sentencing reforms. (§ 1170.126, subds. (a)–(b).) An inmate is now eligible for resentencing if the statutory criteria are satisfied, including the requirement the current commitment offense is not a serious or violent felony. (§ 1170.126, subd. (e).)

Section 1170.126, subdivision (b) provides the foundation for a trial court review under Proposition 36. "Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2)

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of subdivision (e) of section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious or violent felonies by subdivision (c) of section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence . . . [t]o request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12 as those statutes have been amended by the [Reform Act.]" However, an inmate is not eligible for modification if he or she is sentenced currently for a felony defined as serious and/or violent under subdivision (c) of section 667.5 or subdivision (c) of section 1192.7

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Under section 667.5, subdivision (c)(9) robbery is a violent felony. Under section 1192.7, subdivision (c)(19), robbery is a serious felony. Hence, the Legislature and the voters have precluded this defendant from any reconsideration of sentence based on Proposition 36 and its reforms.

Regarding the claim of Equal Protection, the decision to treat crimes distinctly as to sentencing consequences generally does not trigger a valid challenge. (*See People v. Floyd* (2003) 31 Cal.4th 179, 188 [treating those convicted of drug offenses differently based on the date of their conviction does not entail equal protection challenge]; *People v. Lynch* (2012) 209 Cal.App.4th 353, 359 [the benefits of Realignment Act of 2011 can be prospective only precluding relief for those convicted of the same offenses before passage].) With these cases in mind, it seems clear there is no equal protection issue where the Legislature and the voters have determined a person currently serving a sentence for a third strike cannot enjoy the benefits of Proposition 36. Appropriately, less serious prison inmates can realize benefits more serious offenders are precluded from experiencing.

We affirm the ruling of the trial court on the merits.

Case No. 7

Defendant was convicted of one count of resisting an executive officer (Pen. Code,1 § 69; count 1) and one count of exhibiting a deadly weapon to a police officer to resist arrest (§ 417.8; count 2). It was also found that defendant personally used a deadly or dangerous weapon in the commission of count 1 (§ 12022, subd. (b)(1), he had three prison priors (§ 667.5, subd. (b)), one serious felony prior (§ 667, subd. (a)(1)), and three strike priors (§§ 667, subds. (b)-(i), 1170.12).

Thereafter, the court declined to strike one of defendant's strike priors. The court sentenced him to a term of 25 years to life, plus nine years, consisting of 25 years to life for count 1, one year for the section 12022, subdivision (b) enhancement, five years for the section 667, subdivision (a)(1) prior, and three years for the section 667.5,

subdivision (b) prison priors. The sentence for count 2 was stayed under section 654.

In March 2013 Larson filed a petition for sentence recall under the Three Strikes Law. In April 2013 the court denied the petition, finding the section 1170.126 recall did not apply because his current offense was a serious felony.

Defendant appealed. We offered him the opportunity to file his own brief on appeal. He responded by filing as a "responsive brief" a petition for writ of habeas corpus with the Superior Court of San Diego County asserting Proposition 36, the Three Strikes Reform Act of 2012, does not apply to nonserious felonies such as exhibiting a screwdriver. He also asserts (1) that error negated the court's use of an out-of-state

conviction as a five-year enhancement; (2) use of an out-of state conviction as a strike and enhancement was improper; (3) use of an out-of-state conviction as a third strike was improper; (4) the out-of-state conviction should have been considered a misdemeanor; and (5) the out-of-state conviction does not constitute a serious felony.

Defendant thereafter requested leave to amend his supplemental brief, which request we granted. He filed as an amended supplemental brief another habeas petition raising the same issues as his original supplemental brief.

We have reviewed the entire and have not found any reasonably arguable appellate issues.

The judgment is affirmed.

Case No. 8

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Defendant appeals from the order of the Los Angeles County Superior Court denying his petition to recall his sentence under the three strikes law pursuant to Penal Code section 1170.126.1 The trial court denied the petition on the basis of his prior conviction for attempted murder renders him ineligible for relief under section 1170.126.

Defendant was advised of his right to file a supplemental brief within 30 days. He filed a letter brief with the court, seeking relief on the basis his attempted murder prior conviction occurred in 1984, he has not engaged in violence since that conviction, his prison record is good, he has no gang issues, and he has served 16 years on his current commitment.

Defendant was committed to state prison in 1998 for sale of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a). Because he had suffered two prior serious or violent felony convictions, he was sentenced to state prison pursuant to the three strikes law. His exact sentence is not stated in the record on appeal, but presumably it was at least 25 years to life in prison.
Section 1170.126 affords an inmate serving a sentence under the three strikes law an opportunity to petition the trial court for a reduction in sentence. However, the statute is expressly inapplicable to an inmate with a prior conviction for "any attempted homicide offense." (§§ 667, subd. (e)(2)(C)(iv)(IV), 1170.126, subd. (e)(3).) Because defendant has a prior conviction for attempted murder, the superior court correctly
determined he is ineligible, as a matter of law, for relief under section 1170.126.

The judgment is affirmed.

Case No. 9

Defendant appeals from the denial of his petition to recall his sentence of 65 years to life pursuant to Penal Code section 1170.126. Defendant has also filed a petition for a writ of habeas corpus challenging the imposition of one 5-year enhancement included in his sentence. The Attorney General has filed an opposition to the petition and defendant has filed a traverse. We hereby consolidate the two appeals for disposition. We find no merit or cause for further briefing in any of defendant's contentions.

In October 1996 defendant was sentenced to a term of 65 years to life, comprised of two consecutive 25-year-to-life sentences imposed for two residential burglaries (§§ 459, 460, subd. (a)), as third "strikes" pursuant to section 1170.12, subdivision (c)(2), plus three consecutive five-year terms for the commission of prior serious felony convictions in 1982, 1985 and 1991, pursuant to section 667, subdivision (a). In December 2012, defendant petitioned the superior court to recall his sentence and to resentence him pursuant to the recently enacted (by Proposition 36 on the 2012 ballot) section 1170.126. The trial court denied the petition on the ground that defendant is not eligible for resentencing under the new measure because his third strike convictions in 1996 were for serious felonies. Defendant has timely appealed from that denial.

Considering the merits of the appeal, defendant's petition was properly denied. The two residential burglaries for which defendant was convicted in 1996 are "serious" felonies as defined in section 1192.7, subdivision (c)(18). Section 1170.126, subdivision (b) authorizes a person serving an indeterminate term of life imprisonment imposed pursuant to the three strikes law to petition for a recall of sentence only if the sentence was imposed upon a conviction of a felony that is "not defined as serious and/or violent felonies by subdivision (c) of section 667.5 or subdivision (c) of section 1192.7." The trial court properly rejected defendant's suggestion that the court "transform" his prior convictions to come within the new legislation, an act for which there is absolutely no authority.

Defendant's habeas corpus petition presents a slightly more substantive question, but ultimately one without merit. Defendant contends that in 1996 the trial court erred in deeming his 1982 burglary conviction to require a five-year enhancement under section 667, subdivision (a). That section requires imposition of the enhancement for the prior conviction of a serious felony as defined in section 1192.7, subdivision (c). In 1996, the jury returned a verdict finding it true that defendant had served a prior prison term for the following conviction: "2/19/82 Burglary-2d Degree (Residential), San Mateo County, Superior Court Case #C10810." Section 1192.7, subdivision (c)(18), as it now reads, includes as a serious felony "any burglary of the first degree." Since he was convicted in 1982 of burglary in the second degree, defendant argues, the court imposed an unauthorized sentence in 1996 which can be corrected by habeas corpus. (*In re Harris* (1989) 49 Cal.3d 131, 134 fn. 2.)

Initially, we reject the Attorney General's arguments that the issue is not properly considered on a petition for habeas corpus. The evaluation of defendant's contention does not require an inquiry into the sufficiency of the evidence on which the 1996 verdict was based. The verdict, as quoted above, explicitly finds that defendant was convicted of burglary in the second degree for a residential burglary. The flaw in defendant's contention lies in the fact that the applicable statutory provisions have been modified over time. When defendant committed the residential burglary for which he was convicted in 1982, burglary

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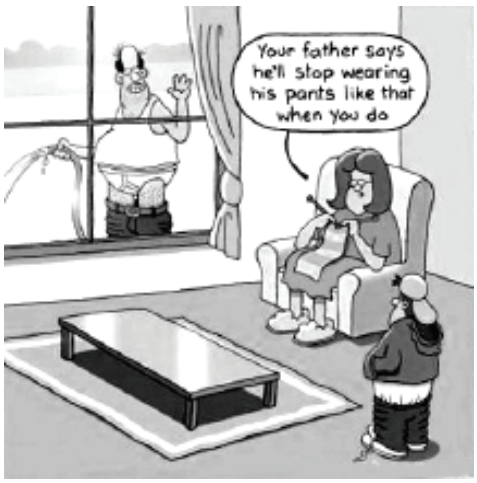
was then defined as first degree only if committed in the nighttime. (Stats. 1978, ch. 579, § 23, p. 1985). That limitation was removed in 1982, subsequent to defendant's conviction. (Stats. 1982, ch. 1297, § 1, p. 4786.) However, the enhancement provision, section 1192.7, subdivision (c), refers not to the previous designation of the offense as first or second degree, but to the conduct underlying the prior conviction. (*People v. Cruz* (1996) 13 Cal.4th 764, 773; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1423.) The enhancement applies if the prior offense was a burglary that comes within the definition of that offense as that crime is defined in section 1192.7, subdivision (c) at the time of the later crime for which the sentence is imposed. Were the current version of section 1192.7, subdivision (c) (18) applicable, defendant's 1982 conviction would come within the statute because all residential burglaries are now defined as a burglary of the first degree.

When defendant was sentenced in 1996, the time that is relevant here, the enhancement provision then applied to "burglary of an inhabited dwelling house" (Stats. 1978, ch. 579, § 23, p. 1985), which clearly applied to the 1982 conviction, whether the burglary occurred in the daytime or the nighttime. Over the course of numerous amendments to both the burglary and enhancement provisions, the intent has been "to treat all residential burglaries as 'serious' felonies" within the scope of the enhancement provision. (See *People v. Garrett, supra,* 92 Cal.App.4th at pp. 1423-1425.) Hence, the imposition of this five-year enhancement was an authorized sentence which there is no reason to set aside.

The order denying defendant's motion to recall his sentence is affirmed. The petition for a writ of habeas corpus is denied.



Case No. 10

Defendant and appellant appeals after the trial court denied his petition for resentencing under Penal Code section 1170.126, known as the Three Strikes Reform Act of 2012 (Prop. 36).

Defendant was charged by second amended information with possession of a controlled substance (Health & Saf. Code, § 11377, count 1) and receiving stolen property (Pen. Code, § 496, subd. (a), count 2). It was further alleged that defendant suffered three prior strike convictions (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and that he had served three prior prison terms (Pen. Code, § 667.5, subd. (b)).

A jury found defendant guilty of both counts, and a trial court found true the prior strike allegations. The court imposed concurrent terms of 25 years to life on counts 1 and 2.

On April 10, 2013, defendant filed a petition for resentencing under section 1170.126. The court denied the petition on the ground that defendant's prior convictions for forcible rape (former § 261, subd. (2)) made him ineligible for resentencing under section 1170.126, subdivision (e).

DISPOSITION
The judgment is affirmed.

Case No. 11

Defendant and appellant appeals from the trial court's order dismissing his motion for reconsideration of the order denying his petition for recall of his 25-years-to-life sentence imposed pursuant to the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and requesting that he instead be sentenced pursuant to section 1170.126. We affirm the trial court's order dismissing his motion.

Following a trial during which a jury found him guilty of willfully evading a police officer (Veh. Code, § 2800.2), on May 10, 1996, the trial court sentenced him to an indeterminate term of 25 years to life because the offense was his third strike within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Acting in pro per, on November 19, 2012, he filed in the trial court a petition for recall of his sentence pursuant to section 1170.126. After reviewing the petition, the trial court filed an order on January 11, 2013, in which it stated: "Pursuant to . . . section 1170.126[, subdivision] (d), defendants seeking recall of sentence under that statute must 'specify all of the currently charged felonies which resulted in' the third strike sentence and must 'also specify all of the prior convictions alleged and proved' as second strikes. Here, defendant has failed to specify all of the prior strike convictions alleged and proved by the People during the underlying criminal proceedings. [¶] Defendant has also failed to allege service of the petition upon the People. A copy of any petition for recall of sentence filed with the court must be served upon the People at the office of the District Attorney, Appellate Division . . . . [¶] For the foregoing reasons, the petition for recall of sentence is denied without prejudice to refile a petition which complies with . . . section 1170.126 and shows service on the office of

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the District Attorney."

On February 15, 2013, appellant, filed a second pro per petition in the trial court pursuant to section 1170.126. On March 21, 2013, the trial court filed a memorandum of decision in which it stated: "Petition for Recall of Sentence Pursuant to . . . section 1170.126 by Defendant, pro se. No appearance by respondent. Petition denied with prejudice. [¶] The Court has read and considered the petition for recall of sentence pursuant to . . . section 1170.126 filed by Defendant on February 15, 2013. [¶] Defendant has suffered a prior conviction under . . . section 667[, subdivision] (e)(2)(C)(iv)(I), making Defendant ineligible for resentencing under . . . section 1170.126. [¶] For the foregoing reason, the petition for recall of sentence is DENIED WITH PREJUDICE."

A review of defendant's "prior record" indicates, on September 16, 1983, when he was 18 or 19 years old, he committed the felony of "oral copulation with [a] person under 14 or with force" in violation of section 288a, subdivision (c) and was committed to the California Youth Authority.

On September 5, 2013 defendant filed in the Superior Court a motion for reconsideration of the trial court's decision. He indicated his late filing of such a motion should be excused under a " 'cause and prejudice' " exception. He indicated, after filing his February 15th motion, he was transferred from Mule Creek State Prison to another facility where, on April 22, 2013, his property, including his mail, was taken away from him and he was placed in "the hole" for "unfounded allegations." Once he was released from the hole, the prison was placed on "lockdown" and he was unable to visit the law library. Due to these " 'external force[s]' " which were beyond his control, he was unable to file a timely motion for reconsideration which he alleges "could have changed the resentencing outcome." Defendant's primary assertion is that, although he was innocent of the 1983 charge of forcible oral copulation, he entered into a plea bargain regarding the offense because his counsel had advised him to do so.

In a memorandum of decision filed September 17, 2013, the trial court indicated it had "read and considered the motion for reconsideration [for] recall of [defendant's] sentence pursuant to . . . section 1170.126 received on September 5, 2013." The court continued, "Defendant previously submitted a petition for recall of sentence pursuant to . . . section 1170.126, which was denied with prejudice on March 21, 2013. [¶] Defendant has suffered a prior conviction of forcible oral copulation [§ 288a, subd. (a)(c)], which is a disqualifying prior conviction pursuant to . . . section 667[, subdivision] (e)(2)(C)(iv)(I), making Defendant ineligible for resentencing pursuant to . . . section 1170.126. [¶] Defendant has now filed a motion for reconsideration. He contends that due to 'external forces' he was not able to file a timely motion for reconsideration after [his initial motion was] denied with prejudice so his 'default consideration' should be excused under the 'cause and prejudice' exception. [¶] If the Defendant wishes to challenge the denial of his petition, his remedy is to file a Petition for Writ of Mandate in the Court of Appeal, Second Appellate District. [Citation.] [¶] For the foregoing reasons, the motion for reconsideration is DISMISSED."

On October 16, 2013, Defendant filed a timely notice of appeal from the trial court's order.

On December 26, 2013, Defendant filed a supplemental brief in which he asserted this court should order the trial court to grant his motion for reconsideration and hold a hearing pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 in which the trial court, pursuant to Welfare and Institutions Code section 1772, could expunge his conviction of section 288a, subdivision (c). He would then be eligible for resentencing pursuant to section 1170.126.

Welfare and Institutions Code, section 1772 subdivision (a) provides that "[s]ubject to subdivision (b), every person honorably discharged from control by the Youth Authority Board who has not, during the period of control by the authority, been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed." Here, however, the record indicates that during the period during which defendant was under the control of the Youth Authority, he was sentenced to state prison. In May 1986, he was convicted of the felony of possession of a controlled substance in violation of Health and Safety Code section 11377 for which he was sentenced to 16 months in state prison. He was returned to state prison for parole violations in February 1988. Then, in February 1989, he suffered a conviction for being a felon in possession of a firearm in violation of former section 12021, subdivision (a). He was sentenced to two years in state prison, the term to be served concurrently with that imposed for his parole violation. In addition, we note subdivision (b) of Welfare and Institutions Code section 1772 states: "Notwithstanding subdivision (a): [¶] . . . [¶] (4) The conviction of a person described by subdivision (a) may be used to enhance the punishment for a subsequent offense."

Under the facts presented and the provisions of Welfare and Institutions Code section 1772, an additional hearing would not have

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resulted in the expungement of his conviction of section 288a, subdivision (c). Accordingly, even if the trial court had granted his motion for reconsideration of his petition to recall his sentence and hold a new hearing on the matter, he would not have been found eligible for resentencing pursuant to section 1170.126.

DISPOSITION
The trial court's order is affirmed.

Case No. 12

In the instant case, the prisoner was denied PC § 1170.126 relief *on the merits*. That is, he got to the courthouse to have a hearing on his request for relief, but was denied on the merits of his case.

Defendant appeals from the trial court's denial of his petition for resentencing under the Three Strikes Reform Act of 2012. Under the Three Strikes Reform Act, "prisoners currently serving sentences of 25 years to life for a third felony conviction which was not a serious or violent felony may seek court review of their indeterminate sentences and, under certain circumstances, obtain resentencing as if they had only one prior serious or violent felony conviction." (*People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1286.) If a defendant such as the one here satisfies certain criteria, "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.126, subd. (f).) "In exercising its discretion in subdivision (f), the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

The trial court denied defendant's petition to recall his sentence because he "poses an unreasonable risk of danger to public safety." Defendant's appeal raises seven contentions attacking the trial court's exercise of discretion. The People begin their response by alleging defendant was not entitled to relief in this proceeding because he agreed to the 25-year-to-life sentence as part of a plea agreement.

We affirm. The People specifically waived in the trial court the contention that defendant's plea agreement precluded him from relief under the Three Strikes Reform Act. As to defendant's arguments, the court acted well within its discretion, and the factual premises of many of defendant's arguments are wrong. Contrary to defendant's arguments, the court evaluated defendant's insight; the court articulated a rational nexus to public safety; the court did not have to appoint an expert to conduct a risk assessment; and the court did not place the burden of proof on defendant.

The record before the superior court was damning. Petitioner had a long, continuous history of criminal acts that dogged him on his petition for relief.

Defendant's Juvenile History, Criminal History, And Misconduct In Prison

Defendant's contact with the juvenile justice system began when he was approximately 12 years old. He had juvenile adjudications for car theft, burglaries, joyriding, contempt of court, violations of probation, escape from a boys' ranch, hit and run, drunk in public, disturbing the peace, resisting arrest, vandalism, and petty theft. He was confined at juvenile hall, a boys' ranch, a boys' treatment center, and ultimately the California Youth Authority. He was released from the California Youth Authority in 1983 when he was approximately 19 years old and then in two separate incidents in 1984 he committed an assault with a deadly weapon and grand theft from a person. In the grand theft, defendant stole cigarettes and punched the store clerk repeatedly in the face while threatening to kill the clerk. He was again committed to the California Youth Authority.

After he was discharged from the California Youth Authority but while still on parole, defendant committed his first strike, assault with the personal use of a deadly weapon, that was sustained in February 1988 at the same time he also sustained a conviction for attempted kidnapping. These crimes began when defendant was following a 17-year-old girl in his car. He got out of his car, grabbed her arm, and she started screaming. Defendant threatened to shoot her and told her "shut up you[']r[e] coming with me." As the girl continued to resist, a passerby intervened, and defendant fled. A few hours later, defendant went into the apartment of another woman and held a knife to her throat. For these crimes, defendant was sentenced to three years and eight months in prison and paroled in March 1990.

Defendant violated parole one month later and then again two more times from 1990 to 1991, including once because he committed an aggravated battery, and he was returned to prison. Two years later in 1993, he was convicted of theft and receiving stolen property and was sentenced to one year in county jail.

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In October 1994, defendant committed his second strike, kidnapping. Defendant and his sister forced the victims at knifepoint (defendant swung the knife at one of the victims) to give them a ride to a liquor store in the victims' car. When defendant and his sister got out of the car, defendant told the victims he would kill them if they told anybody.

Six months later, in April 1995, defendant committed his third strike, receiving stolen property. Using a knife, defendant robbed a convenience store clerk of money, beer, and cigarettes. Defendant pled guilty to receiving stolen property and admitted two prior strikes in return for a sentence of 25 years to life and dismissal of a charge of second degree robbery and three enhancements. This term was to be served after the conclusion of an 18-year sentence he received for the second strike.

Defendant has been incarcerated for these last offenses from 1995 to present, approximately 18 years. While incarcerated in July 1998, he was found to be under the influence of alcohol. In September 1998, he failed to report to his job assignment. In October 1998, he kicked a correctional officer in her knee and spit in her face while under the influence of alcohol. In 2001, defendant obstructed a correctional officer from doing the officer's duties by refusing to remove coverings in his cell that were shielding the officer's view. In April 2003, he failed to report to his job assignment. In November 2004, he failed to report to that job assignment again. In January 2011, he refused to accept his assigned housing.

As a "poster child" for the Three Strikes law, he was denied on the basis of substantial evidence against his claim of reform. With a better record some years down the road, he could reapply to the court.

Case No. 13

Defendant and appellant appeals after the trial court denied his petition for resentencing under Penal Code section 1170.126.

On April 21, 1998, a jury found defendant guilty of one count of battery on a nonprisoner by a prisoner. (§ 4501.5.) A trial court found that he had four prior strike convictions for attempted murder (§§ 664/187) and one prior strike conviction for robbery (§ 211). (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i).) On July 16, 1998, following the denial of defendant's motion to strike his prior strike convictions, the court sentenced him to state prison for 25 years to life.

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On June 17, 2013, defendant filed an in pro. per. petition for resentencing under section 1170.126. The court denied the petition since defendant's prior strike convictions included four counts of attempted murder (§§ 664/187), which made him ineligible for resentencing under section 1170.126, subdivision (e)(3).

Defendant was offered an opportunity to file a personal supplemental brief, which he has done. In his supplemental brief, defendant argues that: (1) the trial court erred in that it did not have enough information on his prior convictions and overlooked the fact that the prior convictions for attempted murder and robbery were nonviolent convictions; (2) his "plea bargain conviction is only (1) strike which has been invalidated as of 12-12-13"; and (3) "new law indicates that pre-1994 plea bargains are no longer valid for three strikes purposes." In light of these claims, defendant contends that this court should resentence him, as requested in his petition.

Although not clearly articulated, defendant's claims appear to contest the true findings on his prior strikes. However, the true findings on his prior strikes are not at issue in this appeal. This appeal is from the trial court's denial of defendant's petition to modify his sentence under section 1170.126. Defendant is not eligible for modification of his sentence because his underlying offenses were serious and/or violent felonies. Section 1170.126, subdivision (e)(3), provides that a defendant is eligible for resentencing if he "has no prior convictions for any of the offenses appearing in" section 1170.12, subdivision (c)(2)(C). Among the "serious and/or violent felonies" that render a defendant ineligible for relief is attempted murder. (§ 1170.12, subd. (c)(2)(C)(iv)(IV) [homicide or attempted homicide].)

The amended information alleged that defendant had five prior serious or violent felony convictions, including attempted murder and robbery. The trial court below found the strike allegations true. Accordingly, as the trial court which ruled on defendant's Proposition 36 petition found, defendant is not eligible for resentencing pursuant to section 1170.126, subdivision (e)(3), because of his prior convictions.

DISPOSITION
The judgment is affirmed.

PROP. 36 RESENTENCING REQUESTS DENIED FOR UNIQUE CASE-SPECIFIC REASONS

In the following cases, Prop. 36 resentencing requests were denied for various unique reasons, which may serve as illustrative examples to potential applicants

People v. Fernando Martinez
CA 4(2), Case No. E056034
February 26, 2014

This case takes on the question of whether in passing the Three Strikes Reform Act of 2012, the electorate intended the mandatory sentencing provision of sections 667(e)(2)(C) and 1170.12(c)(2)(C) to apply to qualifying defendants whose judgments were not yet final on the effective date of the act.

Defendant Fernando Martinez was charged with one count of possession of methamphetamine in a prison. (Pen. Code, § 4573.6.) The information also alleged that defendant had served one prior prison term and that he had suffered three prior serious felony convictions. (§§ 667.5, subd. (b); 667, subds. (c), (e)(2)(A); 1170.12, subd. (c)(2)(A).) A jury found him guilty, and the trial court found the prior conviction and prior prison term allegations true, based on defendant's admissions. The court sentenced defendant to a term of 25 years to life, with a concurrent term of one year for the prior prison term enhancement.

On appeal, Martinez argued that he should only be charged as a second striker, because the provisions of PC §§ 667(e)(2)(C) and 1170.12(c)(2)(C) should operate in cases where the judgments were not yet final on the effective day of the act. The Court disagreed, and Martinez retained his Third Strike sentencing.

The Three Strikes Reform Act of 2012 was enacted by the electorate on November 6, 2012, and became effective November 7, 2012. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126.) Under the three strikes law as it existed before the passage of the Reform Act, all defendants with two or more strike priors received a sentence of 25 years to life upon conviction of any new felony. (Former § 667(e)(2)(A).)

As amended, section 667 provides that a defendant who has two or more strike priors is to be sentenced pursuant to paragraph 1 of section 667(e)—i.e., as though the defendant had only one strike prior—if the current offense is not a serious or violent felony as defined in section 667.5(c) or section 1192.7(c), unless certain disqualifying
factors are pleaded and proven. (§ 667(d)(1), (e)(2)(C).) The Reform Act also provides a procedure which allows a person who is "presently serving" an indeterminate life sentence imposed pursuant to the three strikes law to petition to have his or her sentence recalled and to be sentenced as a second-strike offender, if the current offense is not a serious or violent felony and the person is not otherwise disqualified. The trial court may deny the petition even if those criteria are met, if the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126(a)-(g).) Accordingly, under section 1170.126, resentencing is discretionary even if the defendant meets the objective criteria (§ 1170.126(f), (g)), while sentencing under section 667(e)(2)(C) is mandatory, if the defendant meets the objective criteria.

The intermediate courts have disagreed as to whether the mandatory second-strike sentencing provisions of the Reform Act apply to all qualifying third-strike convictions which were not yet final on November 7, 2012. The issue is on review before the California Supreme Court. (See, e.g., *People v. Conley*, review granted Aug. 14, 2013, S211275 [Reform Act is not retroactive]; *People v. Lewis* [Fourth Dist., Div. Two], review granted Aug. 14, 2013, S211494 [Reform Act applies retroactively]; *People v. Lester* [Fourth Dist., Div. Two], review granted Jan. 15, 2014, S214648 [Reform Act does not apply retroactively].) Defendant contends that the Reform Act applies retroactively. Neither defendant's current offense—possession of a controlled substance in a prison—nor his strike priors—assault with a firearm, attempted robbery and robbery—disqualify him for resentencing pursuant to section 667(e)(2)(C). Accordingly, although he was convicted and sentenced before the effective date of the Reform Act, he contends that he is entitled to be sentenced as a second-striker. The Attorney General contends that the Reform Act applies prospectively only.

2. Section 667(e)(2)(C) Applies to Defendants Whose Judgments Were Not Yet Final on the Effective

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Date of the Reform Act.

There is no question that section 667(e)(2)(C) is an amendment which ameliorates punishment under the three strikes law for those defendants who meet its criteria. However, the Reform Act does not contain any explicit provision for retroactive or prospective application, and it does not explicitly state what remedy—i.e., section 667(e)(2)(C) or section 1170.126—applies to a person in defendant's position. Consequently, we must "look for any other indications" to determine and give effect to the intent of the electorate. (*Nasalga, supra*, 12 Cal.4th at p. 794.)

Applying section 667(e)(2)(C) to nonfinal judgments is wholly consistent with these objectives, in that doing so would enhance the monetary savings projected by the proponents and would further serve the purposes of reducing the number of non-violent offenders in prison populations and of reserving the harshest punishment for recidivists with current convictions for serious or violent felonies, while still assuring public safety by imposing doubled prison terms on less serious repeat offenders.

For both of these reasons—the absence of any expressed intent to apply the act prospectively only and the stated intent underlying the proposition—we conclude that section 667(e)(2)(C) applies to judgments which were not final as of its effective date.

3. Conclusion

We conclude that in passing the Three Strikes Reform Act of 2012, the electorate intended the mandatory sentencing provision of sections 667(e)(2)(C) and 1170.12(c)(2)(C) to apply to qualifying defendants whose judgments were not yet final on the effective date of the act.

People v. Jerry Patlan

CA 6, Case No. H038200
February 26, 2014

On the same day as the case above, the Sixth Appellate District weighed in on the same subject of retroactivity of the Three Strikes Reform Act of 2012.

Defendant Jerry Eddie Patlan appeals his convictions for possession for sale of methamphetamine (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) arising out of a traffic stop. Due to prior strike convictions, the Superior Court sentenced defendant to 25 years to life in prison pursuant to former Penal Code section 667. On appeal, defendant contends [inter alia, that] he is entitled to "automatic, non-discretionary" resentencing due to Proposition 36, the Three Strikes Reform Act of 2012 (the Act), which California's electors approved in November 2012. For the reasons stated here, we will affirm the judgment.

In April 2012, the trial court sentenced defendant to an indeterminate term of 25 years to life in prison pursuant to section 667 after finding the existence of two prior serious or violent felony convictions. In November 2012, California's electors passed the Three Strikes Reform Act, which, as described in greater detail below, generally requires three serious or violent felonies to trigger an indeterminate sentence of 25 years to life. Defendant claims we should apply the Act retroactively and remand this matter to the trial court for "automatic, non-discretionary" resentencing. To decide this issue, we review the Act and published opinions from other districts.

The Court summarized the history of the Three Strikes Law.

As amended, defendants with two prior serious or violent felony convictions who are convicted of a third felony that is non-serious and non-violent no longer automatically face an indeterminate term of 25 years to life in prison. (§ 667, subd. (e)(2)(C).) Instead, these offenders must serve "twice the term otherwise provided as punishment for the current felony conviction." (§ 667, subds. (e)(1), (e)(2)(C) [noting non-serious, non-violent offenders "shall be sentenced pursuant to paragraph (1) of subdivision (e)"].) Even if the current felony is not statutorily serious or violent, however, a defendant must still serve an indeterminate term of 25 years to life if any of the following is true: (1) the current felony is an enhanced "controlled substance charge"; (2) the current felony is a sex offense or requires registering as a sex offender; (3) the current felony was completed while armed with a firearm or with intent to cause great bodily injury; or (4) any of defendant's prior felony convictions is for a crime listed in section 667, subdivision (e)(2)(C)(iv). (§ 667, subds. (e)(2)(C)(i) - (e)(2)(C)(iv).)

To further the objective of prioritizing prison space for high-risk felons, the Act also added section 1170.126. That section states the Act applies "exclusively to persons presently serving an indeterminate term of imprisonment" as

Fernando-from pg. pg. 27

third strike offenders. (§ 1170.126, subd. (a).) It allows felons whose third strike was not serious or violent to petition the Superior Court for resentencing. (§ 1170.126, subd. (b).) Resentencing is only available to felons who, by virtue of meeting the criteria laid out in the preceding paragraph, would be eligible for sentencing as a second strike offender under amended sections 667 and 1170.12. (§ 1170.126, subd. (e).)

Importantly, a trial court has discretion to deny resentencing to a felon who otherwise meets the resentencing criteria if the court finds resentencing "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In making that determination, the court may consider any relevant evidence, including a felon's criminal conviction history and disciplinary record during incarceration. (§ 1170.126, subd. (g).) Finally, felons must petition for resentencing within two years of November 2012 "or at a later date upon a showing of good cause . . . ." (§ 1170.126, subd. (b).)

After an extensive review of relevant cases on the subject, the court concluded that the Reform Act was intended to provide relief only prospectively, and affirmed the trial court's denial of relief.

Despite the lack of an explicit saving clause, we conclude the plain language of section 1170.126 read in the context of the statute as a whole provides clear intent to apply the Act prospectively. As such, we conclude defendant is not entitled to automatic resentencing but can avail himself of the sentence recall petition process if he meets the statutory prerequisites.

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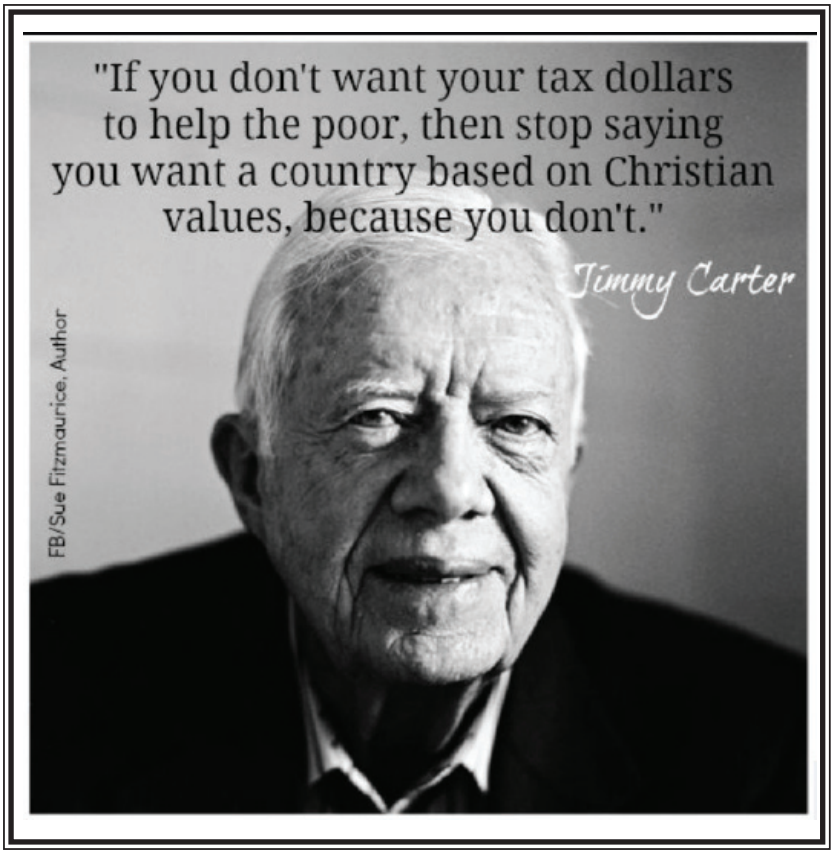


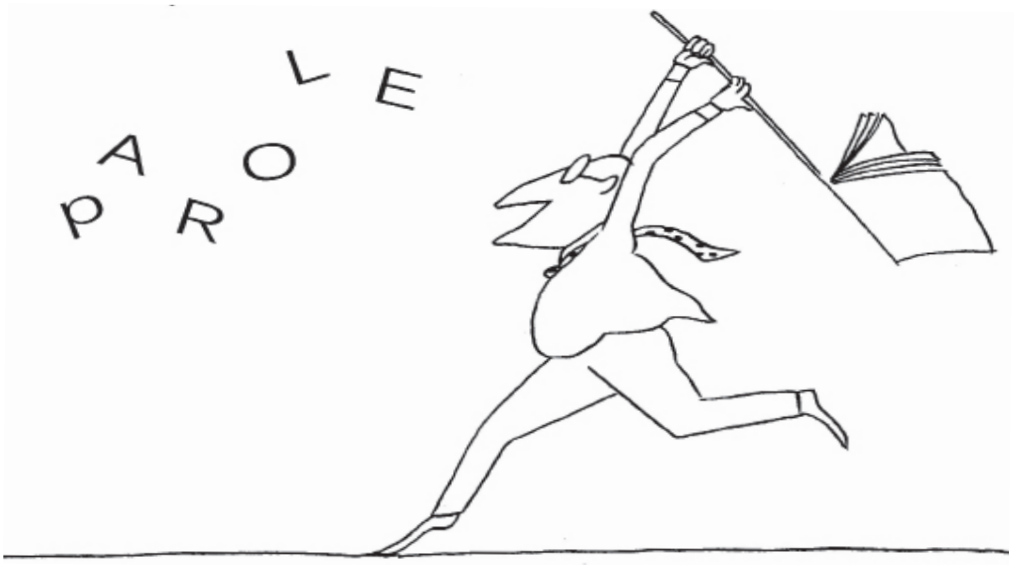
POLITICS / COURTS

SURPRISE!
STATE FILES APPEAL IN GILMAN DECISION

True to form, the Brown administration waited until virtually the last moment before filing an appeal against the February decision by Judge Lawrence Karlton of the Sacramento Division of the U.S. District Court that would have swept away both much of the Governor's power to reverse parole grants and the long-term denial times under Marsy's Law. In late February Karlton issued a carefully documented and thoroughly explained decision labeling both the above laws ex post facto and thus unconstitutional. In that order Karlton ordered a halt to both reversals and long-term denials, but stayed, or suspended implementation of his order for 31 days to allow the state to appeal.

On March 27 the state did take that action, filing a notice of intent to appeal Karlton's decision. The state's action thus further suspends actions ordered by Karlton, until such time as the final adjudication in the Gilman case is made. And when will that be? Anyone's guess.

Karlton's Gilman order has caused the most 'buzz' in recent years, and actually would have more direct impact on lifers than the federal population cap litigation. Whereas the population cap is aimed at all prisoners and efforts to meet that level will only impact lifers tangentially, the Gilman decision is targeted specifically at lifers and the parole process. Whatever the eventual outcome of this litigation will have a direct and immediate impact on lifers.



Judge Karlton carefully and thoroughly laid out his reasoning and facts supporting his decision, giving perhaps the most complete and comprehensive example of what has happened to many lifers' sentences since the implementation of Marsy's law. As shown by the court's decision the incarceration time of many has been significantly increased since 2008.

If the courts eventually side with Judge Karlton and decide against the state, the ramifications could be massive. In theory, even those inmates given the minimum 3 year denial under Marsy's Law might have grounds for appeal, since the old minimum denial length was one year, and, as Karlton spelled out carefully and fully in his order, those given an unlawful 3 year denial (under the decision rendering that portion of Marsy's Law setting denial times as ex post facto and thus unconstitutional) would have potentially been wrongly held in custody an additional two years, had they been given the minimum denial under the old laws and found suitable at their next hearing.

If Karlton's decision regarding long denials is upheld, all those given denials under Marsy's law's provisions of 3, 5, 7, 10 and 15 years could potentially file appeals to reduce their denial length. Similarly, all those lifers incarcerated prior to 1988 when California's governors were given the right to reverse parole dates, and whose dates were taken by any California governor since that time could appeal those reversals, get them vacated and have parole grants reinstated.

While all this sounds complicated, Karlton's order goes to great pains to logically explain the facts supporting his decision and there can be no doubt that the real life examples he portrays undeniably show increased lengths of incarceration. All that remains to be seen is how long the litigation will continue, what the decision will be and, if it goes against the state, how much legal chaos and filings will occur.

Whatever happens, more litigation in this matter seems inevitable.

The question of when the Board will, as agreed to under the terms of settlement In RE: Butler, begin setting term calculations at an inmate's initial or next hearing was finally answered, now that both parts of the bi-furcated Butler case have been decided. In short recap, the Board, via Executive Director Shaffer, previously agreed in a court settlement to begin calculating the base and adjusted terms for all inmates at their next hearing, whether or not there is a finding of suitability, but under the terms of that settlement, that process would not begin until the second part of the case, Butler's appeal of his denial, was complete.

With that final portion of the case now finalized (the court decided Butler had been denied parole for unsupportable reasons, vacated the denial and remanded him for a rescheduled hearing within 60 days of the order) the term setting will begin. At two recent BPH confabs officials affirmed that beginning April 1 all inmates appearing at a parole hearing, initial or subsequent, found suitable or unsuitable, would have a base and adjusted term calculated and announced to them.

The Board was quick and continual in stressing to all parties that the base and adjusted term is NOT the final term of incarceration. Their concerns are that inmates at their initial hearing, being told their base term is decades long, will become despondent, when in fact their actual term of incarceration may be significantly less, when the application of post-conviction credits is calculated. And that cannot be done until a finding of suitability is made.

On the other hand, victims, hearing a decades long sentence length, may be, for them, unpleasantly surprised when notified of either a parole hearing or a grant and release many years before the end of the so-called term. In an effort to allay both concerns the Board continues to preface all discussions of term setting with the caveat that the base/adjusted term is not to be considered the total length of the term served.

The calculating of terms, in the past a rather arduous and error-prone process, will hopefully be made easier by updates and enhancements to the Board's LSTS system, which will, if the newly installed parts operate correctly, calculate the base and adjusted base term for the commissioners, who when have only to either announce it in the case of a denial or apply the post convictions credits when granting parole.

The Board is also quick to reiterate that, despite a major news agency putting forth a story to the opposite, setting of terms will not in any way result in shorter overall sentences for lifers. The ultimate time served continues to be the aggregate of the adjusted base term and application of post-conviction credits.

In any case, all those going to hearings post April 1 should now be more fully informed as to the basic amount of time the state believes they should serve for their conviction. This, in itself, is a major step forward and something long-serving lifers have been seeking for literally decades

THE GOVERNOR'S TRIGGERS

One of the questions often heard from parole panels these days is often "Do you know or what are your triggers?" And in addition to identifying, recognizing triggers, potential parolees are expected to know how to minimize or negate those triggers. We've asked before: Could the Governor get a parole date on the basis of his behavior?

So just in case he needs some help in identifying his triggers, what angers, him, what rankles his feathers and generally rubs him the wrong way enough to cause him to reverse a parole date we here at CLN have made a detailed study of these factors. This is our third effort at discerning these factors, and what we found previously remains largely the same.

In 2013 Governor Brown reversed an even 100 parole dates. Many of the crimes represented in these cases share some common factors. These, we then conclude, are the Governor's Triggers. We may even have some suggestions for how he can deal with these triggers and formulate a relapse prevention plan.

Once again, characteristics of the victims seem to be the main item on Brown's radar. If the victim of the crime is female, elderly, young or in some other way at risk, there is a very significant chance that the governor will reverse the grant of parole. And should that vulnerable victim be in some manner previously known to the inmate (wife, girlfriend, child, even friend) that seems to add to the Governor's indignation, with his reversal letters often noting that relationship and chastising the prisoner for violation of not only law, but his spousal or common responsibilities. Multiple victims are also a trigger, whether it be multiple victims of the same crime, or an aggregate number involving more than one incident.

When the victim of the crime was under the age of 18 the Governor finds that situation noteworthy, regardless of whether the inmate was also under age at the time. While Brown seems to have extra compassion for young victims, that does not seem to carry over to young offenders. How this will play out as those prisoners convicted as juveniles and given grants of parole under the new terms of YOPH/SB 260 hearings we are likely to know within a few months.

Convictions for second degree murder are treated no less harshly than first degree convictions; of the 100 reversals, 36 were for first degree convictions, the rest for second, with two instances of two convictions of first degree convictions. And claims of actual innocence elicit no consideration from the Governor.

Any sort of aggravated circumstances in the offense also seemed likely to draw Brown's ire.

Such factors as torture, children being present at the site and/or witnessing the crime, two charges for one crime (i.e. murder and robbery) and, for lack of a better word, overkill (two methods of fatal assault, i.e. shooting and stabbing) or when additional injuries are inflicted on the victims after death are always cited in reversal latters and clearly cause Brown great angst.

As in previous years any sort of gang affiliation, whether on the streets and/or in prison gangs will often cause a reversal, with the Governor often citing his lack of confidence in the prisoners' repudiation of the gang life as a reason Brown deems the individual still too dangerous to release. The Governor at times comments on such gang affiliations, particularly when it appears the inmate has participated in both street and prison gang activity.

And also a repeat, letters from the family of victims, which Brown often refers to as "heartfelt" can cause a reversal. In fact, it appears letters from victims and family to the Governor after parole has been granted may have more impact than those same letters do at the actual parole hearing. Interestingly, while the Governor often cites these missives as one of his reasons for reversal, nowhere in the law does it authorize him to consider such input.

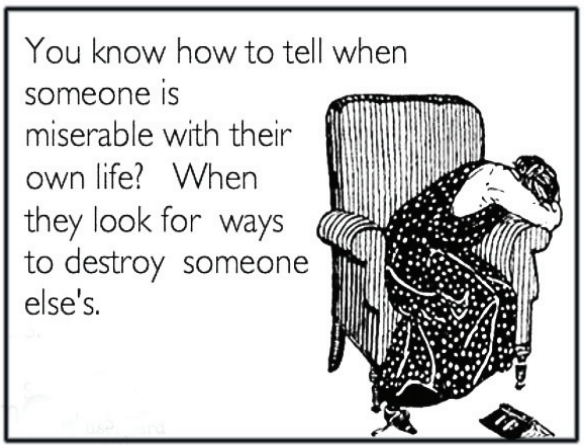
By statute, the Governor can reverse the parole board's decision, in the case of those convicted of either first or second degree murder, after, and only after, considering all the factors presented to the parole panel at the hearing. Thus, if the Governor wishes to consider input from the victims offered at the hearing, he is within legal bounds. But reversal letters often particularly mention 'heartfelt letters'' sent to the Governor, presumably not part of the record of the hearing, and, by extrapolation, outside of the items he is allowed to rely on. Shades of a lawsuit in the making.

Although the Governor has, in previous years, used psych reports as one of the reasons he reverses a date (never is this cited as a stand-alone reason, Brown being a good enough lawyer not to flagrantly ignore recent court actions), he is citing that report more and more often in support of his action. However, many of the psych evals rate the inmate at moderate; like the board, the Governor often appears confused on the definition of 'moderate.'

Just for the sake of clarity, 'moderate' is defined as balanced, calm or restrained.

Also showing an increase in last year's reversals is the use of confidential information as a reason to reverse a parole date, often in spite of the fact that the parole panel has articulated in the decision their consideration and conclusion that such alleged 'information' was unrelated to parole or unreliable. In Brown's thought process any confidential information, no matter how thoroughly investigated and considered by his own appointees, is too much. Interestingly, while inmates and attorneys complain they have no way to address these 'confidential' concerns, as they have no details about these allegations, the Governor often offers up more details and information about the confidential file than the parole panel does during the hearing.

Of the 100 individuals who saw their dates disappear via the reversals, 63 had CDC numbers of "D" or older; 4% were women, about in line with the percentage of women in the



overall prison population. And in 9 cases, lifers suffered a second reversal at Brown's hands.

The Governor's reversal numbers and percentage appear to be creeping upward. This year reversals accounted for about 20% of grants given, up a couple of percentage points from the previous year. And while this number is a vast improvement over former Governor Swartzenegger's usual 80% reversal rate, we are still left wondering why any governor would choose to so often second guess (and in the case of multiple reversals of the same inmate, third-guess) his own hand-picked appointees. Brown has now been in office long enough to have left his mark on the parole board; all present commissioners were either appointed or reappointed by this Governor.

We have to ask, if Brown doesn't trust the considered judgment of his hand-picked representatives, then why did he appoint and/or reappoint them? We would suggest the Governor's attentions could be better utilized elsewhere in CDCR (perhaps in reaching the population cap?) than micro-managing his delegated commissioners. It is arguable whether or not the Governor's reversals contribute the public safety, given that the crime rate continues to decline.

What isn't arguable is that reversals mean additional incarceration time, probably averaging nearly 2 years per reversed inmate. At that standard, last year's decisions by Brown mean potentially almost 200 extra years of prison time the state and its citizens must pay for. And100 extra bodies in the prisoner count reported to the 3 judge panel.

In sum, it appears not only has Governor Brown not learned to recognize his triggers, let alone deal with them, he appears to be adding to his list. Therapy or self-help, anyone?

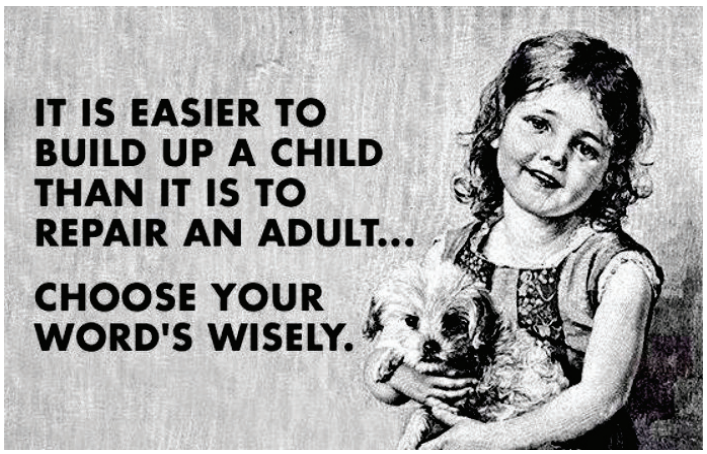
NEW BILLS OF INTEREST

It's that time of year again…April Fool's Day? Yes, but also the season of new bills in the California legislature. Following is a brief summary of some of those new ideas (well, not too many new ideas, but some old ones given another chance) recently introduced.

AB 1633 (Ammiano) Assemblyman Ammiano, a proponent of sentencing reform, has taken the first step toward that goal with this bill, which require the Board of State and Community Corrections to collect and analyze statistics regarding sentencing. The CC board would then recommend changes to the state's sentencing structure to the Governor and the Legislature and publish a sentencing manual for guidance purposes. All of this done in consultation with "stakeholders and experts, as specified."

AB 1652 (Ammiano). Would remove provisions in existing law that render inmates placed in a Security Housing Unit, Psychiatric Services Unit, Behavioral Management Unit, or an Administrative Segregation Unit upon validation as a prison gang member or associate ineligible to receive credit reductions of 6 months for every 6 months of continuous confinement and up to 6 weeks of additional credit in a 12-month period for the successful completion of certain rehabilitative programs.

It would also limit the term of SHU confinement for those prisoners validated as a member, associate, or affiliate of a gang or security threat group to no more than 36 months, if the SHU assignment is based solely on gang status.



AB 2129 (Jones-Sawyer). Would require the CDCR to establish a voluntary prerelease reentry program for inmates in prison, with participation to begin at least 6 months prior to the inmate's release from prison. The program would include, among other things, education programs, transition programs including employment services and skills, and cognitive behavior therapy, including substance abuse treatment and anger management.

While this program sounds like a good idea, and CDCR is currently making a miss-directed stab at this with their LTOPP (Long Term Offender Pilot Program) in three prisons, this bill does not specifically address the needs of lifers, and, with a no-later-than-6-months-before-release clause, would not be accessible to lifer, at least as currently written.

AB 2308 (Stone). At long last, this bill, if enacted, would require CDCR to be certain every inmate released from a state prison has a valid state ID card on release. Lifers, in particular, are greatly in need of assistance in this area, as many, incarcerated for years and without family to help them, struggle to acquire a copy of their birth certificate, in or order to obtain an ID card. Which is needed to get a Drivers' License. Which is needed to get a Social Security card. Which is needed to apply for employment.

SB 1363 (Hancock). This is a bill LSA/CLN will be watching and working very carefully. Under Hancock's proposed bill would further change the newly-in placed consultation hearings, causing the BPH to set criteria for the setting of a base term at that consultation hearing based on any number of factors yet to be fully determined.

But more importantly, *"The bill would require the board to establish criteria for determining whether an inmate is suitable for parole, and would require the board to establish criteria for an inmate's adjusted base term of incarceration, as adjusted by applicable enhancements or credits. The bill would require an inmate who is found suitable for parole to be paroled regardless of whether the base term of incarceration, as adjusted, has expired, subject to certain minimum term provisions and specified review provisions."*

"The bill would require the board's stated reasons to demonstrate, on the record, an individualized consideration of all relevant factors. The bill would require that in the case of an inmate who has served beyond his or her base term of incarceration, as adjusted, a decision by the board to deny parole be supported by substantial evidence and with respect to the entire record."

Interestingly, Hancock's bill would also cause the CDC to satisfy one of the questions we've been asking for years; how many lifers are still incarcerated far past their base terms? Under this bill the CDC would not only have to keep track of this statistic, but report it, and their summary of parole denials and reasons to the legislature.

Specifically, *"The bill would require that in the case of an inmate who has served beyond his or her base term of incarceration, as adjusted, a decision by the board to deny parole be supported by substantial evidence and with respect to the entire record.*

The bill would require the board to collect and maintain statistics that show, annually, the number of inmates in state prison who are serving a term in excess of their base term of incarceration, as adjusted by applicable enhancements or credits, and the percentage of all cases decided each year in which the board, in a final decision, by a panel or the board sitting en banc, has declined to find an inmate suitable for parole, despite the fact that the inmate has served a sentence beyond the base term of incarceration, as adjusted by applicable enhancements or credits. The bill would require the board to report the data to the Legislature on or before January 1, 2016, and annually thereafter."

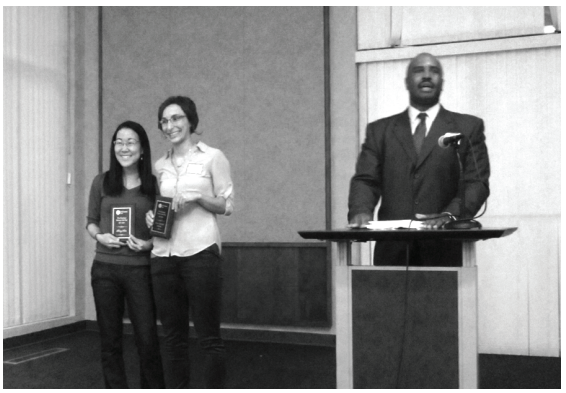
There are other bills dealing with various aspects of corrections and public safety that will be discussed as they warrant attention or become more applicable to lifers.

LSA Attends Berkeley Law Post-Conviction Advocacy Project *One Year Celebration*

As a group of 32 Berkeley Law students providing free legal assistance to California prisoners, P-CAP hosted a one year celebration at UC Berkeley Boalt Hall in early April. Working under the supervision of Keith Wattley at UnCommon Law these students learned to help prepare their clients and represent them at parole hearings.

Law students represented 16 clients and received 6 grants from the parole board. Speaking at the evening's presentation was Justice Anthony Kline, Court of Appeal, 1st Appellate District who encouraged the students to continue their work with this "virtually unrepresented" class and to learn further about not just the parole board hearing process, but the "judicial process".

Attorney Keith Wattley supervised a similar group at Stanford Law School last year.



UC Berkeley Law students & Keith Wattley

NOTABLE 2013 EVENTS FROM THE BPH

Here at LSA/CLN we have questions; lots of them. And we're not shy about asking any and all questions to any and all sources. Many of our inquiries are directed at Jennifer Shaffer and Howard Moseley, Executive Director and Chief Legal Counsel, respectively, at the BPH. And to their credit, both Ms. Shaffer and Mr. Moseley are very responsive, both with information and response time. Our appreciation to them for those efforts.

Many of our questions involve numbers, what and why? How many inmates would be affected if Judge Karlton's ban on governor reversals of parole grants for inmates incarcerated prior to 1988 was upheld (even CDCR doesn't know or hasn't finished the calculations on that one, but we're still asking); what will be the impact of (any given) administrative directive; what does the hearing schedule and grant rate now look like in comparison with that of a few years ago?

Maybe they got tired of our questions or maybe, in line with Shaffer and Moseley's often stated and very real efforts toward making the parole process transparent and understandable, the BPH just decided to put forth some information before we asked. For whatever reason the Board issued a report recently, entitled "2013 Significant Events." Herewith is a sampling of information, some interesting, some mundane but all informative.

In 2013 the BPH scheduled 4,168 parole suitability hearings; these resulted in a total of 590 grants of parole and 1,448 denials. The remainder of the hearings scheduled were accounted for by waivers, stipulations, postponements and other non-decision rendering outcomes. The board performed preliminary reviews on 630 Petitions to Advance (PTA, Form 1045A) hearing date applications and merit review on 483 of those. According to board sources about 59% of PTAs were granted last year. Along with the PTA process the board also reviewed 550 3-year denial decisions as part of its sua sponte administrative review process, which began in July, 2013.

Initial hearings (a Lifer's very first board hearing) yielded 40 grants (and 29 in 2012), which is encouraging in and of itself as we know Lifers often believe a grant never happens at one's initial hearing.

The report also summarizes more than a half dozen legal cases which saw either final decisions or rulings advancing the cases handed down. These ranged from the Valdivia case, closed after 20 years of litigation through the BPH's settlement agreement in Butler to final word in the 3 judge panel population cap litigation. Along the way some 172 habeas writs were addressed, with 13 petitions granted and 8 parole hearings held as a result of successful writs.

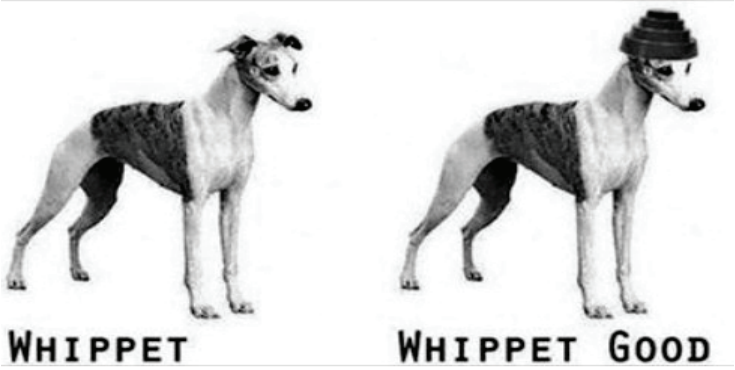
Administrative Directives, from those covering changes in the PTA and administrative review process to changes in the rescission hearing process were noted. Of note were the directives dealing with scheduling hearings following a governor reversal of parole date and changes to the psych evals (comprehensive risk assessments, in FAD speak). The Board expanded the time between a governor reversal of parole and the next suitability hearing from 12 to about 18 months, in an effort allow the prisoner and/or legal counsel to adequately prepare for the next hearing.

The Board was concerned that, since reversals take place up to 5 months after the grant, leaving only 7 months from the time of reversal notification until the next hearing, there would be insufficient time for the prisoner to address the issues relied on by the Governor in the reversal. The new timing now allows an additional 5-6 months to prepare for a new hearing.

The FAD is now using a new version of the HCR-20 (but new does not mean better, or more reliable or relevant), has discontinued use of the LS-CMI and now only uses three levels of risk rating (low, moderate and high) instead of 5, which included low/moderate and moderate/high. The format of the new assessments is also reportedly less duplicative and more relevant, but we have yet to see the new assessments, so the jury remains out on these purported changes.

The events report also lists a veritable phalanx of training sessions, some presented during monthly public meetings that the commissioners were exposed to. Also noted were training sessions for FAD clinicians. But, as we noted and expressed to the board, of the 8 sessions dealing with clinical evaluations and analysis, all but one appeared to have been presented to the FAD by fellow members of the FAD. A better example of 'preaching to the choir' we have seldom seen. Our suggestion was, is and continues to be that the FAD avail themselves of some outside opinions and study.

In line with the present BPH administration's commitment to making the Board and the parole process more transparent and understandable, the 2013 report outlined many changes in information availability, including an expanded website (not much use for prisoners, but helpful for friends and family) that includes a schedule of parole hearings and YOPH-eligible inmates (only a few months out at this point), as well as an email address for public comment;
BPHEXE.BRDMEETING@cdcr.ca.gov.



Again, not of much use to inmates, but CLN encourages you to pass this along to family, who may—and should—make use of it.

Along with many state agencies the BPH is shrinking somewhat. Due to realignment and the shifting of various responsibilities from the state to county process BPH shed 37 Deputy Commissioners in 2013, along with 42 CCI positions and nearly 200 clerical staff, required to support the above higher positions. Those changes caused a budget reduction of over $39,000,000 in the BPH alone. In addition, the new state budget grants the BPH its own line item, providing the Board with more independence from CDCR, as well as greater accountability requirements in the budget process.

There remain, however, 12 commissioners, all at this point either appointed or reappointed by Gov. Brown, all subject to Senate confirmation and all subject to public scrutiny. That's where we come in. Two new commissioners, Susan Richardson and Robert Guererro, will be headed to the Senate for confirmation in the next few months. LSA/CLN observers have been at hearings chaired by these individuals and we are prepared to offer the Senate Rules Committee our considered comments on their suitability for the job. Think of it as something of a quasi-parole hearing for new commissioners: what have you been doing for the past year to prove your suitability for the place and position you want to be in?

And, like parole hearings, the outcomes aren't always what we want, but these hearings are our opportunity to put on record our observations and opinions. And, like a parole hearing transcript, the hearing transcript creates a record that can be used at later hearings, when commissioners who might be reappointed must again undergo examination, to validate their growth and change or sink their ship.

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
January 01, 2014 to January 31, 2014

Hearing Totals*	29	24	26	29	20	30	22	30	22	26	27	0	16	365	666	25**	641

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	GUERRERO	LABAHN	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	VENKAT(PCADM	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	29	22	26	29	19	30	19	28	22	25	25	0	16	154	444	22	422
Grants	6	8	7	8	7	4	6	9	10	12	12	0	7	0	96	7	89
Denials	18	12	12	13	10	20	8	15	8	10	7	0	7	0	140	9	131
Stipulations	3	0	6	3	1	2	0	3	2	1	1	0	0	1	23	4	19
Waivers	1	1	0	3	0	1	1	0	2	1	1	0	0	61	72	1	71
Postponements	1	1	0	2	1	2	3	0	0	1	4	0	1	72	88	1	87
Continuances	0	0	1	0	0	1	1	1	0	0	0	0	0	0	4	0	4
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	1	20	21	0	21

Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)

Subtotal (Deny+Stip)	21	12	18	16	11	22	8	18	10	11	8	0	7	1	163	13	150
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	10	8	13	10	8	12	5	4	6	3	6	0	4	0	89	9	80
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	8	2	3	5	2	5	0	8	3	4	2	0	2	1	45	2	43
7 years	3	2	1	0	1	5	2	5	1	3	0	0	0	0	23	0	23
10 years	0	0	1	1	0	0	1	1	0	1	0	0	1	0	6	2	4
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	1	1	0	3	0	1	1	0	2	1	1	0	0	61	72	1	71
1 year	1	1	0	2	0	1	1	0	2	1	0	0	0	34	43	1	42
2 years	0	0	0	0	0	0	0	0	0	0	1	0	0	16	17	0	17
3 years	0	0	0	1	0	0	0	0	0	0	0	0	0	9	10	0	10
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	1	1	0	2	1	2	3	0	0	1	4	0	1	72	88	1	87
Within State Control	1	0	0	0	0	1	1	0	0	0	0	0	0	57	60	0	60
Exigent Circumstance	0	1	0	0	0	1	1	0	0	0	1	0	0	7	11	0	11
Prisoner Postpone	0	0	0	2	1	0	1	0	0	1	3	0	1	8	17	1	16

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Reviews for 5 year Denials, EnBanc Reviews, PC 1170, Term Calcs, and Inmate Petition (PR/FR).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total* line does not include En Banc Reviews.

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
February 01, 2014 to February 28, 2014

Hearing Totals*	28	30	25	22	19	30	31	29	21	22	22	0	9	324	612	13**	599

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	GUERRERO	LABAHN	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	VENKAT(PCADM	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	28	28	24	21	19	29	31	29	19	21	20	0	9	141	419	13	406
Grants	6	7	5	4	9	10	13	14	6	6	3	0	4	0	87	4	83
Denials	16	19	9	9	7	12	14	11	10	10	10	0	3	0	130	7	123
Stipulations	1	2	3	6	1	1	0	0	0	2	3	0	1	2	22	0	22
Waivers	1	0	1	1	0	1	0	0	0	0	2	0	1	48	55	0	55
Postponements	4	0	4	1	1	3	4	4	3	2	2	0	0	67	95	2	93
Continuances	0	0	2	0	1	2	0	0	0	1	0	0	0	0	6	0	6
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	24	24	0	24

Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)

Subtotal (Deny+Stip)	17	21	12	15	8	13	14	11	10	12	13	0	4	2	152	7	145
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	14	10	9	4	5	7	4	3	4	6	0	0	2	76	3	73
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	6	6	2	6	2	6	4	5	6	4	5	0	3	0	55	3	52
7 years	2	1	0	0	2	2	3	1	1	2	1	0	1	0	16	1	15
10 years	1	0	0	0	0	0	0	1	0	1	1	0	0	0	4	0	4
15 years	0	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	1	0	1	1	0	1	0	0	0	0	2	0	1	48	55	0	55
1 year	1	0	0	1	0	0	0	0	0	0	0	0	0	32	34	0	34
2 years	0	0	0	0	0	1	0	0	0	0	2	0	0	7	10	0	10
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	6	6	0	6
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	1	0	0	0	0	0	0	0	0	0	1	2	4	0	4

Postponement Analysis per Commissioner

Subtotal (Postpone)	4	0	4	1	1	3	4	4	3	2	2	0	0	67	95	2	93
Within State Control	1	0	2	1	1	1	2	2	2	0	1	0	0	60	73	1	72
Exigent Circumstance	3	0	2	0	0	1	2	1	0	0	0	0	0	0	9	0	9
Prisoner Postpone	0	0	0	0	0	1	0	1	1	2	1	0	0	7	13	1	12

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Reviews for 5 year Denials, EnBanc Reviews, PC 1170, Term Calcs, and Inmate Petition (PR/FR).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total* line does not include En Banc Reviews.

Long Term Offender Program Pilot Program CMC, Solano, CCWF

Please Provide Feedback! (ok to use a larger numbered sheet to answer)

1) Did you attend an orientation on the LTOPP? Why/why not? Names of presentors?

2) Do you have a job you will need to leave to participate in this program?

3) Were you told you would "get your job back".

4) Were you told that BPH would require this program?

5) Were you told past self-help programs will no longer be accepted?

6) Did you take the COMPAS test? What did you feel about the questions asked? Were you given the results?

7) Do you plan on participating and why? or why not? Has the program started?

8) Do you disagree with the subjects or content of the programs?

9) How could Lifers that are soon to go home be better served?

General Comments

_____

_____

_____

_____

_____

_____

_____

____Thank you!_____

Please mail to LSA/CLN "Attn. LTOP Form Enclosed"
P.O.Box 277
Rancho Cordova, CA 95741

BPH News

BOARD BUSINESS & EN BANC RESULTS

MARCH, 2014

The March BPH Executive Meeting, aside for the en banc cases considered and decided by the Board, was something of a wrap-up and overview of several new Administrative Directives, aimed at the hearing process that have been either proposed or adopted recently by the commissioners. Though some of these directives, promulgated to streamline the hearing process, have been discussed, explained, modified and re-submitted several times over the several months, remain controversial in some quarters and provide plenty to complain about.

Still apparently mis-understood and causing confusion in both inmate and DA attorney ranks is the directive that limits the amount of new material that can be submitted *on the day of a parole hearing*, by either the inmate or his attorney. The Board recently adopted a limit of 20 pages, either single-sided or 10 pages double-sided that may be submitted on hearing day. This, we hasten to add, and the board continually states, does not include material submitted as part of the parole packet *prior* to the hearing date. The commissioners are not limiting what can be presented to a mere 20 pages, *only what amount of new material they will accept on hearing day*.

As we have noted in past reports, the commissioners, recognizing the toll long hearing days take on everyone, from prisoners to attorneys to commissioners themselves, are seeking a method to provide assurances to prisoners that the last-minute material they offer to the board will receive adequate consideration. In all frankness, to submit a massive amount of 'new' material on hearing day and expect the commissioners to give reasoned consideration of it during the deliberation process is unrealistic. If you have new, late arriving and important information, then by all means, submit it on the day of your hearing.

But it would behoove the astute inmate to include as much as possible in his hearing packet early, so that commissioners have time to read and digest the contents. If there are items in the file or packet that are of particular importance and you fear they may not be in your file (would CDC make a mistake like that?), then perhaps those could be brought to the hearing, but submitted only if the file is incomplete. Despite expressions of concern from both sides of the table, the Board appears determined to streamline this portion of the hearings.

A second Administrative Directive that appears to have at least some folks in a shivaree is that of outlining procedures for participation of parties via audio and video teleconferencing. Many DA s have been 'appearing' at hearings via these methods for some time, but under the new directive victims and their representatives could also add their input electronically. The biggest discord in this proposed policy appears the concern of victims' rights groups and the CDCR's Office of Victims and Survivors Rights and Services that those who first indicate they will appear electronically and then change their minds and wish to be at the hearing in person will be accommodated, when they make that last-minute change.

This would involve last minute gate clearance at the institution as well as some other logistical hurdles. Under the proposed policy victims/representatives could call in from just about any location for audio participation, but would, in all likelihood, have to be at the DA office for video conferencing.

BPH News from pg. 42

Others, LSA among them, are concerned about how secure these conferencing calls would be. Although, via the directive, all parties participating have to affirm they will not record and use the hearings for other purposes, but there is no way to monitor this, most especially in the audio conferencing aspect. While we understand fully that parole hearings and the results, via transcripts, are, at least in theory, accessible to the public, the BPH tightly controls who actually attends hearings and how they are recorded.

Witness the long-time ban on any prisoners' advocates attending hearings, broken only by BPH Executive Director Jennifer Shaffer a few years ago, when she authorized LSA to observe, but not participate in, hearings. Family members of prisoners, who would like to attend and show their support, still are barred from doing so.

Given that we have, in at least one case, already seen victims' family members take to YouTube® to make a video pleading for funds to help fight parole and another create a similar video showing the "story" of the crime, we have great concerns about possible 'pirating' of hearing recordings for miscreant uses. Our hope and expectation is that those participating via video conferencing in various DA offices in the state would be constrained from recording the proceedings, but, given the advances in cell phone capabilities we are not at all sure this could not happen unnoticed or unchecked.

The Board has expanded its new procedure for assigning and training state appointed attorneys to include those chosen to represent Mentally Disordered Offenders, and will hold a special training session for those attorneys later this year. Two panels have been created, one for Atascadero and one for Patton. As to the newly appointed panels for regular hearings, there has reportedly been, as anticipated, some 'movement' in those participants, and as soon as the 'movement' settles LSA/CLN will post the updated panel participants.

Also noted at the March meeting was the spring training session for commissioners, which will be held during the third week of April. As has been the case since the advent of Ms. Shaffer as Executive Officer, many of the sessions will be open to the public. LSA will be there, at all open sessions. Topics are yet to be announced.

The Board also heard, again, a complaint from victims' rights groups about the flow of agenda items at the meetings. Victims groups repeatedly grumble that the public comment item on the agenda is at the end of the meeting. They would prefer to allow public comment at the beginning of the meeting, when the numbers in the audience, seldom overflowing, are at a peak, as they unabashedly maintain this is their forum to spread their word to the public. As constituted for some time, public comment is slated for the end of the meeting. By that time, many in the audience who perhaps came for one specific item or case, have left, thus depleting the numbers available to hear the victims' groups' comments.

LSA, after checking with several sources, including Roberts Rules of Order, on the correct and accepted form for agendas and meetings, believes Public Comment is right where it belongs. The purpose of Public Comment is to allow those in attendance to comment on many things, including actions taken at the meeting. It would be a bit difficult to comment on topics of the meeting, prior to those topics occurring. Secondly, the public comment item on the board's agenda is not a vehicle to inform the public, it is to allow the public to inform the Board. The only individuals who really need to be present for that purpose are the Board members.

In the many times victims' rights groups representatives have complained about the placement of the public comment item on the agenda they have often said they wish to be able to present their opinion/

BPH News from pg. 43

comment early in the meeting, to as many people as possible, and then be able to leave, thus not bothering stay and hear other opinions, facts or discussions.

Perhaps these individuals would do well to consider a viewpoint espoused by many public leaders, including BPH Executive Officer Jennifer Shaffer, who first seek to understand, then be understood. Public Comment at any governmental meeting is not a public forum; that's what press conferences, newsletters and publications are for. And victims' rights groups have plenty of those.

EN BANC RESULTS:

In March the Board appeared to be in more a taking than giving frame of mind, with only two grants of en banc cases and a handful of negative actions.

The Board recommended sentence recall for compassionate release for **Frederick Sidley** after pleas from Sidley's wife and stepson. Sidley was injured in a prison incident last year and has been in a vegetative state since that incident.

The Board also finally agreed to compassionate release for **Thornton Gillis** on this, his third request for such action. In past considerations the board expressed concern that the proposed residence did not provide sufficient safeguards for the community. Although Gillis, who was supported by numerous friends and family members, has outlived two previous time frames offered by medicos this time the board apparently felt his time was sufficiently limited to effectuate his release.

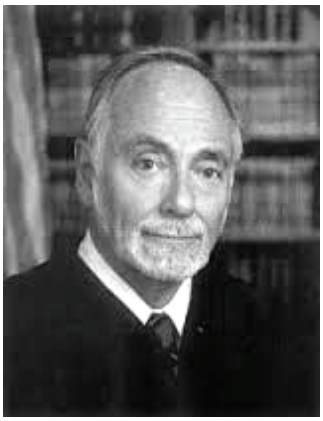
Three prisoners were referred back to the Board by the Governor for en banc review, **Joel Campos, Jesse Solis** and **Brennan McNeese**. Of the trio only Campos prevailed and had his date confirmed by the board. Campos was found suitable even though his hearing was held in December, prior to the implementation of SB 260, for which he would have qualified. In opposing his parole grant the Tulare County DA put great weight (to coin a phrase) on the fact that Campos' victim was a juvenile; never of course bothering to mention Campos himself was a juvenile at the time of the incident.

Solis' grant was vacated following an appearance by his victim, who questioned the prisoners' veracity in saying he had not intended to cause harm to the victim. The board, after comments from the victim and the San Diego County DA, decided a panel needed to revisit that intent at a new hearing.

McNeese, vouched for by a veritable parade of family and friends, fell victim to the Board's increasing preoccupation with information in the confidential file. While these representatives were able to present the Board with the results of an ISU investigation which at least should have allayed concerns expressed by the Governor, the Board decided to vacate the grant, schedule a new hearing and require a board investigation into the allegations in the confidential file.

Also on the en banc agenda were **Martin Calderon, Robert Mejia** and **Byron Myers**, all referred back to the full board by the Decision Review committee. Mejia, who was initially found suitable, apparently admitted to rules violations involving alcohol after his hearing, saw his date vacated and a new hearing scheduled. A somewhat similar situation occurred with Calderon, who the Decision Review committee referred back to the board for additional consideration regarding alleged drug use. Myers, originally denied parole, will have a new hearing and his denial vacated because of "new information from the board's Chief Psychologist the 2013 comprehensive risk assessment relied on by the panel contains a substantive error." In plain language, the psych eval was wrong on the facts, let alone the conclusions. Full marks to the Board's decision review team for discovering and reporting this problem.

KARLTON, ONE OF 3 JUDGE PANEL, TO RETIRE THIS YEAR



Judge Lawrence Karlton, one of the three federal judges that have for years held the CDCR's feet to the fire on prison overcrowding, has announced he will retire in August of this year. Karlton, 79 years old, has served for 35 years in the United States District Court for the Eastern Division of California, which is headquartered in Sacramento.

Karlton graduated from Columbia Law School in 1958, at the age of 23. After serving in the Army from 1958 to 1960, he served was a Civilian legal officer at the Sacramento Army Depot from 1960 to 1962, later entering into private practice in Sacramento until 1976. He also litigated civil liberties cases as a volunteer lawyer for the American Civil Liberties Union.

Ironically, considering Karlton's interactions, as part of the 3 judge-panel, with Gov. Brown, it was Brown, in his first incarnation as Governor in 1976 who tapped Karlton to be a judge on California's Superior Court, where he served until tapped by President Carter to his present position in the federal judiciary. Once he steps down from the bench he will assume the role of "inactive senior judge".

COMMISSIONER STATS

"This really is an innovative approach, but I'm afraid we can't consider it. It's never been done before."

Following the release of results, including the total number, of parole hearings held last year CLN staff has studied the numbers (small), looked for trends (encouraging) and tried to figure out how the 12 commissioners stack up in terms of grants and denials. The good news: more lifers than ever are receiving dates from all commissioners, across the board, no pun intended.

Perhaps number most keenly anticipated is the overall grant rate; for 2013 that was 14%. That number is based on BPH stats of over nearly 4,200 hearings scheduled. While that number looks low, there are many things to consider.

Although 14% is nowhere near the 50% LSA/CLN and many other advocates believe is not only called for in the law ("shall normally find") and believe is eminently possible without damage to public safety, 14% is a far cry above the 3.7% grant rate posted 10 years ago, in 2003. Five years ago, in 2008, the year of Marsy's Law enactment, the grant rate was a whopping 4.3%. It wasn't until 2012 that the number of lifers granted parole topped 500, when 670 were paroled.

Also, note the word *scheduled.* As all in this fight know, almost as many scheduled hearings are not held as are held. Waivers, stipulations, postponements, cancellations all can lead to a hearing not happening. Thus the real grant rate can be found only after eliminating those non-happening hearings from the calculation and considering only those hearings held to conclusion against the number of grants.

And while we have calculated this 'adjusted grant rate' number, we don't publish the results~why give our adversaries easy ammunition to use against us? Those who regularly receive CLN, with the LSTS charts enclosed, can do the math for themselves. Suffice to say, the actual or adjusted grant rate,

BPH Stats, from pg. 45

while not yet approaching the hoped-for 50%, is significantly higher than a simple 14%.

And if further comparison is wanted, we can look back to 1978 and 1979, when the grant rate at hearings was 100%. That's right, 100% of hearings held in 1978 and 1979 resulted in grants. Of course, only 1 hearing was held in each of those years. And in 1980, when the number of hearings held skyrocketed by 100%, to 2 hearings; the grant rate was 0

A full commission consists of 12 commissioners and for most of 2013 the Board had a full compliment. This includes the departure of two members, replaced by two new appointees, both of whom have yet to be confirmed by the Senate. The overall figures used in the calculations represent the hearings held and decided by all commissioners sitting during some part of 2013. Results from last year show all 12 currently sitting commissioners have grant rates with a 14 point spread, from a low of 22% to a high of 38.8% (all adjusted figure results), with most commissioners individually hovering around the low 30s percentage rate.

Of commissioners on the Board for the full year, the commissioner who presided over the most hearing was Terri Turner, who was scheduled for 328 hearings and presided at 239 completed hearings. On the other end of the numbers was Commissioner Peter LaBahn, presiding at 162 completed hearings out of 227 scheduled. The Board lost the commissioner with the lowest overall grant rate, when Jeffrey Ferguson resigned, after presiding at 149 completed hearings, wherein he had a grant rate of 17% (again, adjusted figures).

Those commissioners with the lowest overall suitability grant rate, in descending order, were: Singh, Fritz and Montes. Highest, of commissioners on board the whole year, in ascending order, were: LaBahn, Anderson and Garner. The two newest commissioners, Richardson and Guerrero, are neck and neck with each other and just slightly ahead of Garner after less than 6 months of presiding at hearings on their own.

Also of great concern for lifers are the incidences of long parole denials. While the average denial is 3 years, commissioners still give those odious long term denials. Chief among the nay-sayers was Commissioner Singh, who handed out 4 denials of 15 years and 9 denials of 10 years. Singh was followed by Turner, with three 15 year denials and six at 10 years and Arthur Anderson, who denied twice for 15 years and four times for 10 years.

Also handed out the longest possible denials were Commissioners Brian Roberts, at one 15 year and a pair of 10 years and Ali Zarrinnam, with two 15 years and three 10 years.

Nearly all commissioners, present and past, found occasion to hand out 10 year denials, with only former Commissioner Dan Figueora missing out on the 10 year party, though he did avail himself of the opportunity to hand out a 15 year denial in his half-year on the board in 2013. Even the two new, unconfirmed commissioners joined in, Susan Richardson handing out 2 and Robert Guerrero a single denial of 10 years. In all, inmates were denied on a 10 year basis in 51 hearings and 10 times for 15 years. Five year denials numbered 544 and 19 inmates were denied for 7 years each.

There were only a trio of split decisions in 2013, one each for Commissioners LaBahn, Fritz and Anderson. While 590 inmates received findings of suitability, only 490 will be going home after those decisions, Governor Brown having reversed 100 grants (see story elsewhere in this issue). And as

BPH Stats, from pg. 46

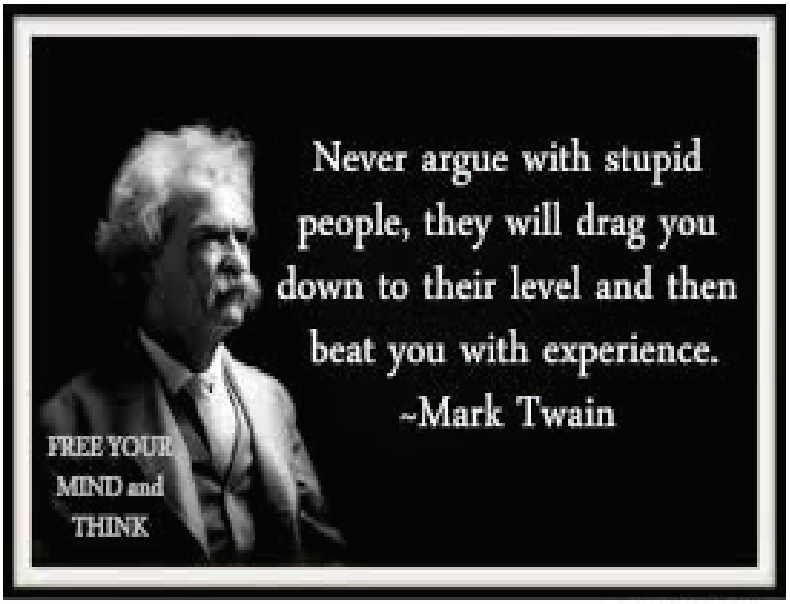
for the old saw that no one gets a grant at their initial hearing; that was proved wrong in 40 cases last year.

The most interesting conclusion after examining the statistics from 2013 is the cohesion of the board commissioners in their decisions. Whether due to increased training (developed under Shaffer's direction), including stints at the National Judicial College for each commissioner, changing political winds (several of the sitting commissioners have served under both Republican and Democrat governors) or better understanding of the effects of unnecessary long-term incarceration and the characteristics of paroled lifers (and we'd like to think advocacy has had some part in that), the commissioners appear to be pacing the same track. And while we still question some decisions and commissioners' thought processes, gone are the days when we could point to any one commissioner with a 'hanging judge' attitude and reputation.

WHAT *NOT* TO SAY AT YOUR PAROLE HEARING

Since LSA has been authorized to attend parole hearings as non-participating observers we have seen the gamut of good, bad, troubling and surprising decisions and behaviors, both from commissioners and inmates. One of the saddest things we have often witnessed is a prisoner talking himself out of a date or worse yet, into a longer denial of parole. While we advocate for paroling lifers we aren't Pollyannas; we know there are many lifers who are not ready to parole. Some not ready yet, some who, for various reasons, may never be ready. So, while we do not necessarily disagree with every denial of suitability, we nonetheless hope for the best outcome for all potential parolees.

Often we see inmates who answer commissioners' questions too quickly, before all the words are even spoken; and often those hasty answers are not on point, don't provide the information the commissioner is seeking or may actually muddy the waters of understanding. Discussing all aspects of an inmate's situation with legal counsel could certainly provide some help in many cases, at the least adequate counsel might be able to alert the prisoner to possible areas of inquiry and have him better prepared to answer difficult questions. In truth, these situations occur most often when the prisoner is 'represented' by a state-appointed attorney, some of whom seem perfectly happy to allow their 'client' to sink himself without the counselor throwing a lifeline in the form of advice or intervention. After all, they will be paid in any case and another lifer denied parole means another hearing for them a few years down the road.



BPH-What Not to Say from pg. 47

Since LSA/CLN is not a legal firm and can't give legal advice, we can't tell you what to say or when to decline to answer. But we can offer up some recent scenarios that we think illustrate what we are concerned about. The following situations are mined from recent, real hearings (identifying information redacted) and hopefully will provide some food for thought. And possibly, some dark humor.

Commissioner: I see you have support letters from several women. How did you meet all these ladies? And how do you keep in contact with them?

Inmate: Through the internet.

(Decision: denied 5 years)

~~~~~~~~~~~~~~~~~~~~~~~~

Commissioner: So how much did that cell phone you had cost you and how did you pay for it?

Inmate: Cost me $1000 but I didn't have to pay for it, 'cause I sold another one for the guy so he gave me one.

Commissioner: Oh, so you were involved in a criminal enterprise while in prison.

Inmate: Yeah, I guess.

(Decision: denied 7 years)

~~~~~~~~~~~~~~~~~~~~~~~~

Commissioner: Tell me, who do you think your victims are?

Inmate: The lady, her family and me.

Commissioner: You're a victim?

Inmate: Yeah, cause I been in here (XX years) and it wasn't even me that shot her. I deserve to go home and start my life over.

(Decision: denied, 7 years)

We rest our case. Perhaps the saddest thing about these examples is that they are just the most obvious of the many off-putting remarks made by prisoners during their hearings. Often what prisoners say is off-putting to us—*and we're on your side*!

Of the three above examples the last is the most egregious. To place yourself in the victims column, regardless of the circumstances of the event, is a sure-fire way to receive not only a denial, but a longer than average denial. You may feel like a victim, you may indeed be a victim of society, a victim of circumstances, a victim of over-prosecution. But you are not a victim of the life crime and it is that crime that is under discussion at your hearing. When commissioners say they want inmates to realize and recognize the larger pool of victims to their actions, it does not mean that pool extends to the prisoner.

Similarly, many inmates come into their hearings angry. Angry at CDCR, the Board, their cellie, the world. We even know of instances in which the prisoner has expressed his anger and frustration to the board in very personal and descriptive terms. Not only does such delivery guarantee a denial, subsequent hearings, even those for medical parole and compassionate release, can be adversely affected.

And as for cell phone beefs, these should be discussed with your attorney, not only in terms of how to address the resultant 115, but also how to handle the sorts questions from commissioners we are more frequently hearing, delving into the manner of acquisition of the phone. At least one commissioner has attempted to solicit information at a hearing on names of other prisoners in the facility that might have cell phones. Whether and how you should answer such inquiries, should they occur at your hearing, is an issue to be resolved with your attorney prior to the hearing; but be aware, these questions are possible.

Perhaps the best advice is to slow down and consider your answer before responding. You've been there awhile. Take a few seconds to think about what you'll say, in case those few second spent in consideration may help you, overall, spend less time where you are now.

WHAT DOES CCA STAND FOR?

Corrections Corporation of America
or Corrections Corruption and Attitude?

America's Leader in Partnership Corrections
CCA.com

What does CCA stand for? To borrow an old joke, apparently, they'll stand for just about anything. So long as it bring in the bucks.

CCA, officially Corrections Corporation of America, owner and operator of your friendly neighborhood private, for-profit prison compound, is under investigation by the FBI for fraud. Specifically, the feds are looking into allegations that CCA falsified employment records to hide the fact that the Idaho Corrections Center was so badly understaffed that it gained a reputation as a "Gladiator School" due to the violence.

CCA reportedly understaffed the prison by literally thousands of man hours and falsified records, often showing guards working 48 hour straight shifts to hide the lack of manpower. The company has been held in contempt of court after failing to abide by the terms of a settlement agreement reached with inmates who filed suit over the high rates of violence and chronic understaffing at the prison. This, only one of many suits against CCA for uncontrolled violence and gang activity and other possible criminal activity in addition to contract fraud. How bad must things be when inmates file suit on the grounds of excessive violence?

Amid finger pointing all around, CCA says the forensic audit firm of KMPG performed an inconclusive audit of the company's management and contractual compliance. KMPG's audit, however, was conclusive enough to show CCA had understaffed the Idaho prison by a whopping 26,000 man hours. While the Nashville, Tenn. Based firm agreed to repay the state $1 million to settle the understaffing issue, CCA is still in the black, as their contract with Idaho runs $29 million annually. This, however, does not take into consideration the money expended by CCA for contributions to Idaho's Republican Governor, C.L. "Butch" Otter, who originally declined to call for an investigation of the fraud allegations, but changed his mind when the pesky issue kept popping up with more details and substantiation.

And it isn't only in Idaho that CCA has had problems. Ohio compliance auditors found a CCA operated prison had no running water for the waste system, leaving inmates using plastic bags and cups to relieve themselves. CCA run prisons have been characterized as 'a gulag' by more than one observer. Immigration detention facilities under CCA management have been plagued with suicides, even of those detainees supposedly under close watch for such events.

Closer to home, CCA's 2,300+ bed facility at California City has been a CDCR overflow site for several months. Inmates shuffled there from other garden spots in the state report such problems as not enough bedding, lost property, no library, no hot water and, in some cases, insufficient, even by CDCR standards, medical access. Many inmates on chronic medications have been shipped to California City only to be shipped back to their original prison within 2 weeks when it became obvious their medication needs could not be met at the CCA location. There have even been reports of medical staff at California City trekking into town to fill scripts at the local chain pharmacy. Just another example of what Jerry Brown touts as "gold plated" medical care for prisoners.

PEPPER SPRAYING MENTALLY ILL IS UNCONSTITUTIONAL

CDCR's Director of Adult Institutions Michael Stainer called them "at best, controlled chaos," but federal Judge Lawrence Karlton called them "horrific." At issue were CDCR made videos showing mentally ill prisoners being doused repeatedly with pepper spray, part of CDCR's use of force tactics for dealing with MDO inmates. After weeks of harrowing videos, testimony and sometimes tears from observers Karlton declared CDC's practices unconstitutionally harsh and ordered the department to continue changes already begun.

Evidence presented at the hearings included information about the death of one prisoner, on suicide watch, fitted with a trach tube in his throat to facilitate his breathing, who was repeatedly doused with pepper spray because he would not remove his hands from the food port in his door. Joseph Duran's death at Mule Creek State Prison in September was not originally part of Karlton's consideration, but the judge ordered the hearings reopened and the facts surrounding Duran's death included in the case.

CDCR estimated there are currently about 33,000 mentally ill prisoners in state facilities. Karlton's order also limits the use of solitary confinement for such inmates. Prisoner attorney Michael Bien hailed Karlton's ruling, calling it "a solid, well-thought-out order that should go far in remedying the problems exposed during the hearings. Even while they were still going on, the state started to make changes that it had before refused to consider. It is our hope that, rather than fighting this order, the state will work with us in implementing it."

Bein was referring to changes in CDC policy made after a half dozen of some 17 videos showing guards repeatedly pepper spraying mentally inmates were played last fall in Karlton's courtroom, causing some spectators to be moved to tears and Karlton himself was visibly troubled by the viewings. While the judge made note of what he termed "overall significant progress" in CDCR's policies regarding pepper spray, he noted major changes still were required, including prohibiting custodial staff from over-ruling medical staff in decisions on treatment of mentally ill inmates.

The state has already put in place requirements that guards wait at least 3 minutes before subjecting inmates to second blast of pepper spray and guards may no longer use force simply because an inmate refuses to relinquish control of a food port.

Inmate Duran was repeatedly doused with pepper spray for just that infraction, and Bien said he believed Duran's death had a marked impact on Karlton's decision. "The avoidable and preventable death of a mentally ill inmate, with a tracheotomy which restricted his breathing, housed in a licensed mental health unit, after being pepper-sprayed for the 'offense' of not releasing his food port, was one important incident in the evidence considered by Judge Karlton leading to today's ruling," Bien said.

Under Karlton's order the state must return to his courtroom within 60 days to report additional changes in use of force polices and have only 30 days to file a plan limiting the use of solitary on the mentally ill.

GUARD OVERRULES MEDICAL STAFF- INMATE DIES—AGAIN

In less than 2 months two California inmates died, at least in part due to interference with medical staff by CCPOA guards.

On October 15 inmate David Gillian was found hanged in his cell at PVSP during the 6 am 'pill pass.' Gillian was supposed to have been monitored every two hours by guards, but an internal investigation revealed guards may not have made their rounds as scheduled and required.

But more troubling than the potential neglect of rounds was what happened when Gillian was found. The medical technician who first saw him hanging from an air vent attempted to begin the mandatory CDCR process of cutting the man down and beginning CPR. On entering the cell with a correctional sergeant and finding no pulse the medic was prevented from lowering Gillian's body from the bed sheet noose by the sergeant.

Another medical staffer and a doctor appeared and demanded to be allowed into the cell to attempt CPR, but were also refused. Instead, Gillian's body remained hanging from the vent for nearly four hours. Some reports indicated the guard determined the cell was crime scene and thus could not be disturbed. This, despite the fact that Gillian was single-celled.

The Gillian debacle comes hard on the heels of another inmate death in which custodial officers prevented medical technicians from entering the cell to help an inmate. On Sept. 7, 2013 inmate Joseph Duran, who breathed through a tube in his throat, died after being pepper-sprayed by guards. Duran, who was on suicide watch, had removed the tube from this throat after being sprayed and was apparently trying to clean the tube and soothe his throat when he died.

Medical personnel, who asked to be allowed to remove Duran from his cell to assist in the process, were overruled by guards who claimed the situation was too dangerous. The death was originally ruled a suicide until later investigations brought forth the details of the incident.

Reactions to the two deaths varied, as might be expected. Don Specter of the Prison Law Office called the Gillian situation "outrageous, it actually defies the human race." CDCR Secretary Jeffrey Beard, on the other hand, held the Duran incident was an isolated incident, saying that "sometimes you're going to have breakdowns, sometimes mistakes might get made."

There are mistakes, and then there are fatal mistakes. CDCR seems to have a penchant for the latter kind.

PICK A NUMBER, 0 – 2

CLN's

So, how many CLNs did you get last issue? One? None? Two?

Any of those answers is possible. Those of us putting CLN together and in the mail have finally stumbled on a company that rivals CDCR is sheer inability; both to get things done and tell a straight story.

This large, national company, which shall remain nameless (but starts and ends with the letter S), has been printing and mailing CLN for the past year. You'd think by now they would have figured it out, especially since during our first printing experience with them they forgot to put CDC numbers on all inmate copies. That little debacle cost LSA over $400 to ransom returned copies back from the post office, re-address by hand, apply first class postage and re-mail. Did we make them pay us back for that goof? Yes, we did.

And like that old saying about the way to a man's heart being through his stomach, we figured the way to a company's brain was through their profits, and, having burned themselves once, at least that mistake wouldn't happen again. Well, guess again.

After paying for printing and mailing and being assured all copies had been mailed, we breathed a sigh of relief and began looking forward creating the next (this) edition. Until. We were alerted, thankfully, by an inmate at DVI, who must have been one of the first, and possibly one of the only, prisoners to receive that issue of CLN. He wrote to let us know that not only was his CDC number missing from the address, so was his housing information, and could we please add those designations to his address, so he could be sure to receive future issues.

Our response to this letter can only be described as dumbfounded. Not again! And worse. After a rampaging visit to the local storefront (and remember, we've been dealing with CDC for years—we know how to rampage), heated and repeated phone calls to and from California and Canada (the customer service reps for California are in Canada? Not even the same country, much less the same state?) this "That was Easy" company finally fessed up to screwing up. Big time.

The fix? A total reprint and re-mailing of all issues of CLN. With CDC numbers and housing assignments this time around.

We anticipate that most institutions will not take the time and effort to search out inmates to deliver their CLN issues without the required information, but some, obviously, will. So our subscribers may receive no issue, if the prison simply trashed the CLNs received without complete information; one issue if the second mailing with all the required information reached them, or maybe, just maybe, two issues, if they were lucky enough to be in an institution with a decent mail room staff who not only delivered the second, well addressed printing, but went the extra step of delivering the first printing as well. Kudos to the mail rooms at those (we suspect few) prisons.

All of this means: we're actively searching for another printing company.

OLD PRISONER GROUPS NEVER DIE

They just pass the baton

Prisoners' Rights Union (PRU), active in the prison reform movement for more than 20 years and based out of Sacramento, has dissolved as of April, 2014. The non-profit 501 c 3 that was the basis of PRU found it could no longer sustain the effort, due to shortage of funds and lack of participation.

While Director Mona Manley has made intrepid efforts for many years to maintain the momentum of PRU, it is more of a load than one person can carry. Those of you who wrote to PRU for resources and issues may consider directing your inquiries to LSA and we will respond to those questions consistent with our mission of helping lifers in all aspects of their incarceration and readiness for parole.

We, as was the case PRU, are not attorneys and cannot provide legal advice, represent anyone in court, intercede with CDCR or affect transfers. Not do we sell books, reprints, merchandise, buy stamps or provide a pen pal service. And our efforts and expertise lies with the situation of lifers in California prisons: we can't take on the entire population of the nation's prisoners in city, state and county jails. With over 35,000 lifers in California custody alone, we've got our hands full.

We have, however, managed to retain the most valuable resource from PRU: Mona Manley will now join the growing LSA/CLN volunteer staff, still dedicated to doing what we can for prisoners and their families.

Welcome, Mona. The goals and efforts of PRU live on in LSA and the work continues.

OVERCROWDING, DUTCH STYLE

California, it seems, is not alone in a prison overcrowding crisis. The Netherlands is also struggling with prison overcrowding, with a slight twist, and perhaps our state could learn something from this Dutch Dilemma.

In the Netherlands, national population about 16,664,000, the prisoner population is 9,710. That's just over 200 fewer prisoners than guards, whose numbers stand at 9,914. Yes indeed, we said there are FEWER PRISONERS THAN GUARDS in the Netherlands. A CCPOA dream.

Dutch Justice Ministry spokesman Jochgem van Opstal said his nation department has begun "studying what the reason for the decline [in prison population] is." DOJ in the Netherlands has already begun prison closures.

California~take note!

What We'd LIKE to say...

On board a Southwest Flight from YOUTUBE

Flight attendant who truly wanted to get the attention of the passengers…(with great Southern accent...)

"If I could pretend to have your attention for the next few minutes please…

"My ex-husband, my new boyfriend, and their divorce attorney (gesturing to the other attendants) are going to show you the safety features aboard this 737-800 series," said flight attendant Mary Cobb. "Position your seat belt tight and low across your hips, like my grandmother wears her support bra.

If you choose to depart early…there's 8 ways to get there…2 exit doors near the front, mid and rear and you can guess on the other 2.

Everybody gets a door prize…in the seat pocket in front of you along with the dirty diapers, chewing gum wrappers, banana peels and the other gifts you leave us from time to time…there is a safety card…take it out…check it out.. because in the very unlikely event that the Captain chooses an early water landing each and every one of you gets your own tiny-weeny yellow bikini (shows inflatable vest)

It inflates sometimes automatically or you can blow into the small tube…and as our flight attendant travels down the aisle to show you…(be sure to tell her how attractive she is)… you'll also need to place your seat and tray table up, stash your items under the seat in front of you, being certain there is no room for your legs or feet.

As you know this is a no smoking, no whining and no complaining flight. It is however a "please and thank you" and "you are such a good-lookin' flight attendant flight"

Smoking is never permitted while in flight and if we catch you smoking in the lavatory it becomes a

$2000 flight and if you wanted to pay that for your airfare you should have flown some other airline.

If we do make you that nervous that you must have a smoke, you can step outside…we do not discriminate. We have a special smoking section outside just for you. If you tamper with the smoke-detector in the lavatory…well Lord help you. Basically, just do what we say and no one gets hurt.

If we experience a loss in cabin pressure…well if that happened often, we certainly wouldn't be at work tonight. If that does happen and the mask falls from overhead…first, stop screaming..let go of your neighbor, pull on the plastic tubing, place the mask over your mouth and breathe normally. To activate the flow of oxygen simply insert 75 cents for the first minute, and 30 cents each minute after. Although the plastic bag may not inflate with oxygen, you will be receiving lots and lots of gin.

And if you're traveling with small children?.... We're sorry. Maybe choose the one with the most earning potential.

In the meantime…sit back and relax..or lean forward and be tense. It's your ride."

(this is taped and on YOUTUBE, the passengers applauded loudly at the end…at least they listened!)

CLN SUBSCRIPTION FORM

I am enclosing $_____ or _____ stamps (4 .45cent stamps = $1)

My name, ID, housing and complete mailing address:

_____

_____

_____

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Inmates: 1 Year $30; 2 Years $50; 3 Years $75
Other: 1 Year $90; 2 Years $170; 3 Years $250

Back issues: $6.00 (or 20 stamps) each
sent to **CLN, P.O. Box 277, Rancho Cordova, CA 95741**

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